A

DIGEST

OF

ENGLISH CIVIL LAW.

EDITOR:

EDWARD JENKS.

BOOK III, SECTS. XIII-XVII.

PROPERTY (CONCLUDED)

EDWARD JENKS.

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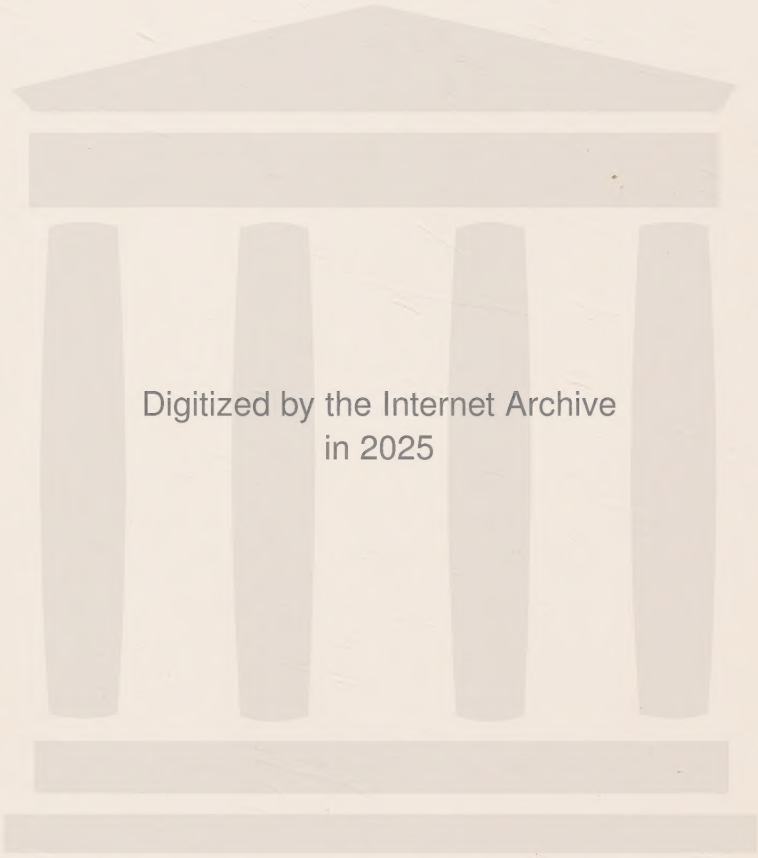
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BY

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BOOK III

SECTIONS XII–XVII

LAW OF PROPERTY (*concluded*)

BY

EDWARD JENKS

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PREFACE

WHILST it has not been thought desirable to include in the present volume any part of Book IV (Family Law), it is matter for satisfaction that the vast subject covered by Book III (Property Law) has been completed in a comparatively short space of time, and, as the author and his colleagues believe, without any omission of substance.

The difficult but increasingly important subject of Choses in Action, dealt with in the earlier pages of this volume, though much of it is now reduced to statutory form, has been fruitful in interest for those who are concerned with the growth of law. At first we see the notion, that a right of action may become alienable property, struggling against the primitive conception of the Law of Maintenance, by which the community seeks to put down oppression in legal proceedings. The most powerful factor of progress in this struggle is, of course, the Law Merchant, whose votaries decline to admit that a debt is merely an occasion of litigation. In their experience, debts are frequently (perhaps usually) paid without dispute; and so they gradually drive out the older barbaric notion, that no one will be such a fool as to pay a debt if he can possibly escape doing so.

Meanwhile, the primitive common law has begun to struggle with yet other novel ideas, which threaten to disturb its ancient prejudices. The new art of printing it regards chiefly as a danger to the established order; and it

quickly elaborates a series of police regulations to keep it in bounds. A little later still, the claim of the Crown to establish monpolies is made the subject of constitutional struggle; and, when that struggle ends, a new species of property ('patent' rights) is seen to have emerged, as it were by accident, to rank side by side with the new 'copyright' which has grown out of the new State regulations for printing. Almost simultaneously, the immense possibilities opened up by the new trade routes discovered in the sixteenth and seventeenth centuries, give rise to a new form of co-operative mercantile adventure, which rapidly replaces the older system of the 'regulated' companies. Thus 'shares' and 'stock' spring into existence, raising new problems which the law has reluctantly to face. With some hesitation, practitioners, fastening on the fact that these new proprietary rights have no tangible subject-matter, class them, not with the old chattels corporeal, but with choses in action, with which chattels corporeal have long been contrasted. The analogy is feeble; for patents and copyright, if not shares and stock, are rights *in rem*, not merely *in personam*, and there has always been some doubt about the classification. But the later activity of what may be called 'equitable police' begets yet other rights (e. g. trade marks and 'goodwill') which clamour for recognition, and are, not unnaturally, classed, along with patents and copyright, as 'choses in action.'

It is hardly surprising, when one reflects on the various origins of the English Law of Property, to find that it contains few rules applicable to all kinds of property, indiscriminately. Such few as exist will be found stated in Sections XV and XVI (pp. 1058–1096, of this volume). Their meagreness is astonishing, when we reflect how much of them is statutory, and how little even the rules of co-

ownership, though stated in a general form, apply to anything but land. It will hardly be believed by a layman that, in the present year of grace, English law has no obvious remedy for the joint owner of a chattel whose co-owner unreasonably refuses to divide either the enjoyment or the proceeds of it. A father bequeathes a valuable picture to his two daughters jointly; believing that they are destined to live together all their lives. One daughter marries — perhaps against her sister's wish. The latter, not unnaturally, but surely unjustly, refuses to give up the picture, or to buy her sister's share. There is no obvious legal remedy for the situation; though, possibly, an ingenious Court might, by a straining of the law, treat the daughter who retained the picture as 'converting' her sisters's share, and direct a jury to award the latter half the value of the picture as damages.

At the end of the Book on Property, the author has endeavoured to delineate the Law of Trusts. As is well known, the Trust is a phenomenon practically unique in English Law; though its root idea comes from ancient Teutonic stock. To English folk, who have grown up in daily familiarity with its workings, to whom 'my trustees,' or 'my wife's trustees,' are household words, the astonishment of the foreign jurist when he tries to wrestle with the problem of the Trust, is incomprehensible. And yet the astonishment of the foreigner is not without its justification. The Trust, looked at objectively, is a queer thing. Who is owner of the trust property — the trustee, or the beneficiary? The cautious person will reply that the answer depends upon what is meant by 'ownership.' And that is no easy question, either. Even if you decide that the essential idea of ownership is not beneficial enjoyment, but mastership or control, and that, therefore, the trustee is

'owner,' still you have not solved the problem; for all lawyers know that the control of the trustee is hampered at every turn by rules laid down by the old Court of Chancery, which was much more inclined to treat him as an official than as an owner. In fact, the metaphysical problems which can be raised on the Law of Trusts are numerous, and, probably, insoluble. It is enough for our purpose to know what are the rules under which this famous institution has so long satisfied the practical needs of a business-like community; and these will be found set out succinctly in the seventy paragraphs of Section XVII, the concluding Section of the Book on Property.

Is it presumptuous to say that the English Law of Trusts has satisfied the practical needs of the community? We think not, if the words be weighed. The complaint about Trusts has been, not that the rules are bad, but that trustees have been dishonest, or stupid, or both. Now that the great experiment of the Public Trustee has been undertaken to meet that difficulty, and has, apparently, been a brilliant success, the institution of the Trust is like to become more popular than ever. In fact, the danger, it would seem, is, not that the Trust will cease to be used, but that it will be used for purposes which it was never intended (at least by honest folk) to serve, and that the monopolist or the reckless speculator will shelter himself behind the fortress built to protect the widow and the orphan. If that day comes, the Law of Trusts will require grave re-casting.

Though two Books (Family Law and Succession) still remain to complete the work, it is believed that these (especially the former) will be very short, and may, possibly, even be included in a single volume. Family Law, owing

to the emancipation of the married woman and the removal of the relationship of Master and Servant to the domain of the Law of Contract and Tort, has lost much of its former bulk. Succession is, of course, important; but it is, after all, but a single branch of the law of alienation. The end of a long task is in sight.

March, 1914.

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ERRATA AND CORRIGENDA IN PRECEDING VOLUMES

BOOK I

Page 16, line 16. For "29 Q. B. D. 599," read "22 Q. B. D. 599."

Page 17. On definition of "choses in action," see *Howard* v. *Fanshawe* [1895] 2 Ch. 581.

Page 17. (As authority for § 42) *Central London Railway* v. *Land Tax Commrs.* [1911] 2 Ch. 467.

Page 21, § 48. Add to note the following words: —

"'Convict' here means only a person against whom judgment of death or penal servitude has been recorded on conviction for treason or felony (Forfeiture Act, 1870, s. 6)."

Page 28, § 70. In line ten, strike out all words after "creditors"; and, in line fourteen, strike out all words after "trustee" to the end of the sentence. Add at end of paragraph: "and all transactions by a bankrupt with any person dealing with him *bonâ fide* and for value in respect of property, whether real or personal, acquired by the bankrupt after his adjudication, will, if completed before any intervention by the trustee, be valid against the trustee."

Bankruptcy and Deeds of Arrangement Act, 1913, s. 11 (1).

Page 50, § 118, note. After "Book III," add: "Sect. III, Tit. I, §§ 1368–1374, *post*."

BOOK II, PART II

Page 226, last line. For "Companies Acts, 1862–1908," read "Companies (Consolidation) Act, 1908"; and add, as authority: "Companies (Consolidation) Act, 1908, s. 29."

Page 303, § 687, line 15. After the word "insurance," insert the words: "other than a contract of marine insurance."

Page 304, line 2. Add, at end of paragraph, "Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a policy," and add, as authority for inserted statement: "Marine Insurance Act, 1906, s. 22."

Page 305. Add, after line fourteen, the words: "and policies of marine insurance by the Marine Insurance Act, 1906, s. 50."

BOOK II, PART III

Page 322, § 716, line 23. After the word "another" insert the words: "as a civil debt"; and add, as authority: "*Raulin* v. *Fischer* [1911] 2 K. B. 93."

Page 327, line 5. For "464," read "364."

Page 331, line 20. After "goods," insert "(including live animals)." And add, as authority: "*White* v. *Stedman* [1913] 3 K. B. 340."

Page 332. Add after note (d) the following sub-note: "[The duty of a railway company, or other body enjoying monopoly rights or statutory privileges, may, in this respect, be considerably greater than that of an ordinary person (*Norman* v. *G. W. R.* [1914] 2 K. B. 153).]"

Page 336, § 737, line 19. After the word "plaintiff," add the words: "and, therefore, separate damages cannot

be awarded against them." And add as authority: "*Greenlands* v. *Wilmshurst* [1913] 3 K. B. 507."

Add to note the words: "Taking money out of Court which has been paid in by one defendant as satisfaction of a joint cause of action is a destruction of the whole claim (*Beadon* v. *Capital Syndicate* (1912) XXVIII T. L. R. 427)."

Page 387, § 824. Add to note (b) the words: "But commoners can sue each other without proof of special damage for acts involving physical interference with the user of the common rights (*King* v. *Brown* [1913] 2 Ch. 416)."

Page 398, § 844. The doubt stated in the note is now answered in the affirmative by *Hope* v. *Osborne* [1913] 2 Ch. 349.

Page 443, Appendix. Add to list of statutes: —

"Highways Act, 1835 (5 & 6 Will. IV, c. 50) s. 79 (persons committing certain offences)."

Page 520, § 1011. Add as note: "The same principle applies where the statement is published by two or more persons jointly (e. g. author and publisher) and malice is proved against one of them (*Smith* v. *Streatfeild* [1913] 3 K. B. 764)."

BOOK III

Page 559, § 1050, n. To the cases cited: add *Re Leach* [1912] 2 Ch. 422, where the Court seems to have assumed that an equitable fee simple could be validly limited (by a testament) until alienation.

Page 563, line 25. After the word "Crown," insert the words: "for services rendered"; and add, as authority: "*A. G.* v. *D. of Richmond* (*No. 1*) [1907] 2 K. B. 940."

Page 577, line 7. For "(1892)," read "[1892]."

Page 652, line 8. After "(96)," add the words "other than Elegit (*Lloyd* v. *Davies* (1848) 2 Exch. 103)."

Page 689, § 1210, note, line 5. For "law," read "Law."

Page 730, § 1279, margin. For "of," read "on."

Page 743, § 1300, note. Add the words: "And an office involving personal trust cannot be aliened (*Bedell* v. *Constable* (1669) Vaugh., at p. 181)."

Page 749, § 1304, note. Add, at end of note, the words: "Nevertheless, it should be remembered that, even at the present day, a limitation to A to the use of B, or to A and his heirs to the use of B and his heirs (*simpliciter*), will give B the legal estate, by virtue of the Statute of Uses."

Page 752, line 20. For "*Dower Act*," read "Dower Act."

Page 754, line 20. For "*Bogot*," read "*Bagot*."

Page 759, line 8. Add "428."

Page 763, line 1. For "(e)," read "(c)."

Page 771, line 14. For "*Llanwrwst*," read "*Llanrwst*."

Page 802, § 1376. Add the following note: "[The covenant need not have been entered into by an absolute owner; if the covenantor had power to bind the land (*Long* v. *Gray* (1913) 58 Sol. Jo. 46). But a mere contract to purchase does not enable the purchaser to bind the land (*Millbourn* v. *Lyons* [1914] 1 Ch. 40).]"

Page 809, line 14. Substitute comma for semi-colon.

Page 831, § 1415 (iv), line 25. After the word "any," insert the word "unreasonable," and add, as authority: "*Kreglinger* v. *New Patagonia Co.* [1914] A. C. 25."

Page 974, line 18. For "*Valentine*," read "*Valentini*."

Page 974, line 19. For "Wills Act (1837)," read "Wills Act, 1837."

Page 975, line 1. For "or" read "of."

BOOK III

PROPERTY *(continued)*

NOTE.

All alterations in the law made since the issue of the previous volumes are noted in the list of Errata which appears in the present volume. By noting up in the earlier volumes the list of Errata, subscribers can keep their volumes absolutely up-to-date.

lowing section, the term 'chose in action,' unless otherwise specified, includes all kinds of incorporeal personal property, other than (i) rights immediately connected with land, (ii) rights to sue for unliquidated damages, (iii) rights arising by virtue of trusts, (iv) rights to shares in the estates of deceased persons, and (v) negotiable instruments.

[The vagueness of the phrase 'chose in action' in English law has been previously noticed (Bk. I, § 41 n.); and it would be difficult to frame an exact definition of a conception the scope of which enlarges from year to year at the bidding of practical

requirements. Probably the term came into use as a convenient expression to cover all forms of property which were incapable of inclusion in the medieval classification of land and chattels; and it is in this sense that it is here adopted as a third division of this Book. But, unfortunately, the Courts have on some occasions applied it to rights, e. g., of presentation to a vacant ecclesiastical benefice (*Brooksbie's Case* (1588) Cro. Eliz. 173) and rights to relief against forfeiture of leases (*Howard* v. *Fanshawe* [1895] 2 Ch. 581), which are more appropriately now regarded as interests in land, and have, accordingly, been so treated in this work. The nature and incidents of the right to sue for damages for breach of contract or quasi-contract, or for the commission of a tort, have also been dealt with under the Law of Obligations (*ante*, Bk. II, Pt. I, Sect. IV; Pt. III, Sect. I, Tit. VI). There is a very close resemblance between choses in action and the rights of beneficiaries under a trust, a testament, or an intestacy; but, for historical reasons, such rights were not usually regarded by the Common Law Courts as actionable, and were enforced in other tribunals. Hence they will be more conveniently treated under the special heads of Trusts and Succession (*post*, Sect. XVII, and Bk. V). Negotiable instruments, being governed by the Law Merchant as adopted and modified by the Bills of Exchange Acts, 1882 and 1906, do not form part of the subject-matter of this work.]

Rules affecting choses in action

1618. Generally speaking, and subject to Section XIV, *post*, the rules affecting the ownership of chattels corporeal (*ante*, Sect. IX), the acquisition of chattels corporeal absolutely or by way of security (*ante*, Sect. X, Tit. I), and the incapacity to hold or alienate chattels corporeal (*ante*, Sect. XII), are applicable equally to choses in action as defined in § 1617.

But: —

(i) the provisions of the Sale of Goods Act, 1893, including the doctrine of sale in market overt (*ante*, Sect. X, Tit. I,

§ 1568) have no application to choses in action;

Sale of Goods Act, 1893, s. 62.

(ii) notwithstanding the general rule of Equity on the subject of mortgages (*ante*, Sect. IV, Tit. II, § 1415 (i)), debentures issued by a company incorporated under the Companies Act, 1908, may be made irredeemable, or redeemable only on the happening of a contingency, however remote, or at the expiration of a period, however long;

Companies Act, 1908, s. 103.

(iii) a minor who acquires choses in action may repudiate them before or within a reasonable time after attaining his majority;[a] and (*semble*) a minor cannot, except by virtue of special statute, make a binding alienation of a chose in action.[b]

(a) *Newry and Enniskillen Ry. Co.* v. *Coombe* (1849) 3 Exch. 565.
Curtis' Case (1868) L. R. 6 Eq. 455.
Capper's Case (1868) L. R. 3 Ch. App. 458.

[*Mann's Case* (*ibid.* n.) which, apparently, treated the transfer to the infant as a mere nullity, would appear to have been wrongly decided. An infant may even be sued for calls on shares held by him (*N. W. R. Co.* v. *McMichael* (1850) 5 Exch. 114).]

(b) Practically the only modern authority on the capacity for alienation by a minor, viz. the case of *Taylor* v. *Johnston* (1882) 19 Ch. D. 603 (*ante*, Sect. XII, § 1610) dealt only with gifts of chattels corporeal, including bank-notes, which are not choses in action for the purposes of this Section; and the Court limited its decision to alienation by delivery.

[Reference to a proceeding which applies only to choses in action may perhaps here be made; though it is not necessarily a security in the nature of a mortgage. This is the notice, accompanied by an office copy of an affidavit claiming an interest in stock, shares, or securities standing in the books of a company (including the Bank of England), which may be given to the company in manner provided by R. S. C., O. XLVI, rr. 4–7, and which has the effect of the abolished writ of Distringas (r. 8). The company which has received such notice is bound to give the person lodging it eight days' notice of any attempted transfer of the stock, &c., by any other person; and, during that time, the person giving the notice may commence an action for an injunction to prevent the company registering the transfer (*Re Blaksley's Trusts* [1883] 23 Ch. D. 549).]

'Possession' of choses in action

1619. There can be no possession of a chose in action. But:—

(i) debts due or growing due to a bankrupt in the course of his trade or business will be deemed to be in his 'order and disposition' for the purposes of the Bankruptcy Acts, until notice of a transfer has been received by the respective debtors, or the true owner has taken every possible step to 'obtain possession of the debt';

Bankruptcy Act, 1883, s. 44 (iii).
Colonial Bank v. *Whinney* (1886) L. R. 11 App. Ca. 426.
Rutter v. *Everett* [1895] 2 Ch. 872.

(ii) the delivery of documents of title to choses in action, by way of security for the payment of money, will entitle the person to whom or on whose behalf such deli-

very is made to a charge in equity upon such choses in action, and a lien upon such documents of title;

Colonial Bank v. Whinney, ubi sup., at p. 433, *per* Lord Blackburn.

[For the nature and effects of an equitable charge, see *ante*, Sect. IV. Tit. III; of a lien, *ante*, Sect. X. Tit. II, §§ 1591–1603.]

(iii) a deposit of a bill of lading by way of security will have the effect described in Sect. X. Tit. II, § 1581 (*ante*); but it will not transfer the right to sue or the liability to be sued on the contract with the ship-owner, unless it was the intention of the parties that the property in the goods should pass to the creditor;

Bills of Lading Act, 1855, s. 1.
Sewell v. *Burdick* (1884) L. R. 10 App. Ca. 74.

[As to the effect of allowing documents of title to remain in the hands of a vendor or purchaser of goods, see *ante*, Bk. II, Pt. II, Sect. I, Tit. I, § 405.]

(iv) a *donatio mortis causâ* of choses in action may be validly effected by a delivery to the intended donee of a document which, in the opinion of the Court, forms the indicia of title to property.

Duffield v. *Elwes* (1827) 1 Bli. N. S. 497 (bonds and mortgages).
Moore v. *Darton* (1851) 4 De G. & Sm. 517 (receipt containing terms).
Re Dillon (1890) 44 Ch. D. 76 (banker's deposit notes).
Re Weston [1902] 1 Ch. 680 (Post Office Savings Bank Book).
Re Beaumont, ibid. 889 (cheque).
Hudson v. *Spencer* [1910] 2 Ch. 285 (banker's deposit notes).

[The principles upon which the Court proceeds in arriving at this conclusion are far from clear; and the cases by no means easy

to reconcile. Thus, for example, the handing over of a mere receipt for money will not be a good *donatio mortis causâ* (*Re Davis* (1902) 86 L. T. 889); nor will the delivery of certificates of railway stock (*semble*, not being to bearer) (*Moore* v. *Moore* (1874) L. R. 18 Eq. 474). And the delivery of title deeds does not pass any interest in the land (*Duffield* v. *Elwes*, *ubi sup.*, at p. 539, *per* Lord Eldon, following Lord Hardwicke.) According to the ordinary rule of delivery (*ante*, Sect. VIII, Tit. I, § 1531), a chose in action of which the documents of title are already in the possession of the intended donee, may be made the property of the donee by mere oral direction (*Cain* v. *Moon* [1896] 2 Q. B. 283).]

TITLE II — DEBTS

1620. A debt is a definite sum of money recoverable from one person (the 'debtor') by another person (the 'creditor') by means of a common law action; whether payment can be claimed immediately or not. *Definition of debt*

Guardians of West Ham v. *Bethnal Green* [1896] A. C. 477.
Sharpington v. *Fulham Guardians* [1904] 2 Ch. 449.
Re Mitchell [1913] 1 Ch. at p. 206, *per* Parker, J.

[Historically, the 'specific' character of a claim in debt has been of great importance; and, though the long prevalent distinction between the quasi-proprietary action of Debt and the purely personal action of Assumpsit has disappeared with changes in legal procedure, its effects have by no means disappeared. Thus, while it may be said, broadly, that claims to unliquidated damages can only arise out of contract or tort, 'debts' may be payable also by virtue of tenure, statute, bond (which originally was not regarded as a contract), judgment, a call on shareholders, a failure to perform public liabilities, and other causes. And, even now, the distinction between a debt and an unliquidated claim under a contract may be practically important; e. g. a right to the performance of a contract for personal services is not assignable, but a right to a definite sum of money due under such a contract is (*Crouch* v. *Martin* (1707) 2 Vern. 595; *Russell* v. *Austin Fryers* (1909) XXV T. L. R. 414).]

1621. A 'debt of record' is a debt which is payable by virtue of a recognizance [a] entered into with the Crown or a person acting on behalf of the Crown, or by virtue of a judgment or other order of an English court of record. Such debts can be enforced in *Debt of record*

a summary manner by execution or other process of the court.[b] In the case of debts due to the Crown on recognizance, there is no limitation of time for their recovery.[c] In the case of a judgment debt due to a private person, execution cannot be issued without the leave of the court after six years from the date of the judgment;[d] and, after twelve years, the judgment can no longer be enforced, by action or otherwise, unless in the meantime a written acknowledgment or part payment of the debt has been given or made by the debtor or his agent, to the creditor or his agent.[e]

(a) A recognizance has been judicially defined as an acknowledgment of a "fixed debt due to the Crown, which may be discharged by the fulfilment of a certain condition, or which, on its non-fulfilment, becomes an absolute debt" (*Re Nottingham Corporation* [1897] 2 Q. B., at p. 513, *per* Ridley, J.). A very similar acknowledgment, known as a *cognovit* or *cognovit actionem*, or warrant of attorney to confess judgment, was, at one time, frequently given to private creditors; and it is still technically possible, though difficult to make use of, being regulated by ss. 24–28 of the Debtors' Act, 1869. But it was merely a step leading to judgment; and it has, in practice, been superseded by a judge's order giving leave to sign judgment on certain conditions (*Gowan* v. *Wright* (1886) 18 Q. B. D. 201).

(b) Of course, the existence of summary remedies does not prevent the creditor resorting to an action if he pleases; except in the case of County Court judgments, upon which no action can be brought (*ante*, Bk. II, Pt. III, §§ 716, 717).

(c) *Regina* v. *Bayly* (1841)1 Dr. & W. 213 (Sugden, L. C. I.).

[The limitation of time when a private person is suing on a recognizance is twenty years from the cause of action (Civil Procedure Act, 1833, s. 3).]

(d) R. S. C., O. XLII, rr. 22, 23.

(e) Real Property Limitation Act, 1874, s. 8.
Hebblethwaite v. *Peever* [1892] 1 Q. B. 124.
Jay v. *Johnstone* [1893] 1 Q. B. 189.

1622. A 'specialty debt' is a debt which is payable by virtue of a deed or other sealed document.[a] Generally speaking, such a debt can be sued for at any time within twenty years after the cause of action arose, or within twenty years from the last acknowledgment in writing or part payment of the debt by the party liable or his agent.[b] *Specialty debt*

(a) *Re Artizans Land and Mortgage Corporation* [1904] 1 Ch. 796.

[Where the debt, though arising in connection with a transaction embodied in a deed, does not arise from any covenant, express or implied, it would seem that it is only a simple contract debt (*D. of Ancaster* v. *Meyer* (1785) 1 Bro. C. C., at p. 464, *per* Lord Thurlow, C.; *Yates* v. *Aston* (1843) 4 Q. B., at p. 196, *per Curiam*). But this appears to be somewhat inconsistent with the terms of the Civil Procedure Act, 1833, s. 3, which treats 'any action of debt for rent upon an indenture of demise' as an action on a specialty.]

(b) Civil Procedure Act, 1833, ss. 3, 5.

1623. A 'bond debt' is a debt due by virtue of a sealed acknowledgment by the debtor ('obligor') of his liability to pay to the creditor ('obligee') a certain sum of money.[a] Where to such acknowledgment is annexed a condition that the bond shall be void on payment of a smaller sum of money and interest, the bond is said to be a 'money bond'; and, on breach of the condition, the sum payable under such condition, with interest and costs, but no more, may be recovered in an action on the bond.[b] Where the condition of the bond is the performance of any covenants or agreements in any indenture, deed, or *Bond debt*

writing, the obligee, in an action on the bond, must assign breaches, and can only recover such sums as the jury assign in respect thereof, and costs;[c] but where the condition of the bond is the performance or non-performance of some other act, then the obligee, on breach of the condition, may recover the full amount of the sum for which the bond was given.[d]

(a) *Morrant* v. *Gough*, (1827) 7 B. & C. 206. (This case shows that the bond need not take the form of a condition with a penalty.)
(b) 4 & 5 Anne (1705) c. 3, s. 13.
Gerrard v. *Clowes* [1892] 2 Q. B. 11.
(c) 8 & 9 Will. III (1696) c. 11, s. 8.

[Judgment may, however, be recorded for the full amount of the penalty, and, in the event of further breaches, execution for further sums may be issued by leave of the Court (*ibid.*).]

(d) *Strickland* v. *Williams* [1899] 1 Q. B. 382.

[This decision does not, apparently, interfere with the general principle by which Equity will relieve against penalties (*ante*, Bk. I, § 117; Bk. II, Pt. I, § 313).]

Debts payable by virtue of statute

1624. All debts arising directly out of statutes, including liabilities for calls on shares, are specialty debts, and can be recovered at any time within twenty years after the happening of the cause of action;[a] except that all actions for any forfeiture upon any statute penal, whereby the forfeiture is limited to the Crown only,[b] and all actions for penalties, damages, or sums of money given to the party grieved by any statute,[c] must be brought within two years after the causes of

such actions arose; and all penal actions for any forfeiture upon any statute penal whereby the forfeiture is limited to the Crown and to any other who may prosecute in that behalf, must be brought within one year after the offence has been committed.[d]

(a) *Corke & Bandon Ry. Co.* v. *Goode* (1853) 13 C. B. 826.
(b) 31 Eliz. (1589) c. 5, s. 5 (the persons bringing such actions are technically known as 'common informers').
(c) Civil Procedure Act, 1833, s. 3.

[An action by the official of a quasi-public authority for penalties for the infringement of a statute regulating trade or manufacture, is not an action by a 'party grieved' within this section (*Robinson* v. *Currey* (1881) 7 Q. B. D. 465).]

(d) 31 Eliz. (1589) c. 5, s. 5. (These actions are technically known as '*qui tam*' actions).

Simple contract debts

1625. Subject to the special provisions of any statute affecting the same, all debts other than those specified in §§ 1621–1624 *ante*, are 'simple contract debts,' and can be recovered by action within six years after the cause of action arose,[a] or after a written acknowledgment or part payment by the party liable,[b] or by his agent duly authorized.[c]

(a) Civil Procedure Act, 1833, s. 3.
(b) Statute of Frauds Amendment Act, 1828, s. 1.
(c) Mercantile Law Amendment Act, 1856, s. 13.

[The last enactment does not expressly refer to payments *by* an agent. But, presumably, on general principles, payment by a duly authorized agent is payment by the principal. At one time, the distinction between specialty and simple contract debts was of great importance in the administration of the estates of deceased persons; but the distinction has been almost entirely abolished by the Admin-

istration of Estates Act, 1869. Debts of record still, however, retain their priority in such cases. In bankruptcy proceedings, all debts (other than those specially provided for by the Preferential Payments in Bankruptcy Act, 1888) are payable *pari passu*.]

Foreign judgments

1626. Sums certain due under foreign judgments may be recovered as debts in English courts, subject to the provisions set out in Book II, Pt. III, § 716, *ante*; but such debts are only simple contract debts, and (*semble*) have no priority in the administration of the estates of deceased persons.

Walker v. *Witter* (1778) 1 Doug. 1.
Hall v. *Odber* (1809) 11 East, 118.

[Legal phraseology is familiar with many other classes of debts, e. g., 'book debts' (debts due in the course of business and recorded in the books of the creditor), 'mortgage debts,' 'gambling debts,' &c. But these are, for the most part, merely descriptive, and have no technical meanings.]

Actions by common informers

1627. An action of debt, or information, by a common informer for a penalty, is barred by the pendency of a *bonâ fide* action, or information, previously commenced by another person, against the same defendant, for the same penalty; even though the earlier action has not been brought to trial.

Chalchman v. *Wright* (1603) Noy, 118.
Girdlestone v. *Brighton Aquarium* (1878) 3 Ex. D. 137.
Forbes v. *Samuel* [1913] 3 K. B. 706.

[The later action is not abated (*Baines* v. *Blackbourne* (1755) Sayers, 216; *Combe* v. *Pitt* (1763) 3 Burr. 1423). And so, presumably, if the earlier action is withdrawn or defeated, the later may be proceeded with.]

TITLE III — ANNUITIES AND PENSIONS

Definition

1628. An annuity or pension is a certain yearly sum[a] (whether payable by instalments or not,[b] and whether liable to increase, reduction, or cesser, on the happening of a condition, or not[c]) payable to a definite person or persons ('annuitant') for a wholly uncertain period,[d] or for a term of years or life, or in perpetuity.[e] Even when an annuity is charged on land,[f] or when it is granted to a man and his heirs,[g] it is personal estate.

(a) The essence of an annuity is, that it is in the nature of income only. A bond may be given to secure the payment of an annuity; but if a principal sum is secured, the income is not an annuity (*Winter* v. *Mouseley* (1819) 2 B. & C. 802). There does not seem to be any difference in principle between an 'annuity' and a 'pension;' but the latter term is usually confined to annuities given as a reward for past services, real or imaginary (See remarks of Joyce, J., in *Knill* v. *Dumergue* [1911] 2 Ch., at p. 203).

(b) *Blackborn* v. *Edgley* (1719) 1 P. Wms. 600.
Re Dowse (1881) 50 L. J. Ch. 285.

(c) *Martin* v. *Margham* (1844) 14 Sim. 230.
Arnot v. *Tyrrell* (1855) 21 Beav. 49.
Thompson v. *Cartwright* (1863) 33 Beav. 178.
Adams v. *Adams* [1892] 1 Ch. 369.
Re Adamson (1913) 108 L. T. 179.

[Of course, if the condition is contrary to the policy of the law (*ante*, Bk. I, §§ 114–117) it will be void (*Hunt-Foulston* v. *Furber* (1876) 3 Ch. D. 285).]

(d) *Turner* v. *Turner* (1783) 1 Bro. C. C. 317.

[Lord Loughborough's *dicta* in the latter part of his judgment are not entirely consistent with now generally accepted views.]

(e) *A. G.* v. *Christ's Hospital* (1831) 9 L. J. (O. S.) 186 (perpetuity).
Thompson v. *Cartwright, ubi sup.*
Blight v. *Hartnoll* (1881) 19 Ch. D. 294) } (life).
Re Morgan [1893] 3 Ch. 222 }
Re Drayton [1912] 56 Sol. Jo. 253 (*pur autre vie*).

[The presumption, in the absence of special circumstances, is that an annuity is for the life of the annuitant; and, even in a testament, a gift of an annuity to the legatee, simply, will only create a life interest (*Blight* v. *Hartnoll*, *ubi sup.*, at p. 296, *per* Fry, J.; approved in *Re Morgan*, *ubi sup.*, at p. 229, *per* Lindley, L. J.).]

(f) *Taylor* v. *Martindale* (1841) 12 Sim. 158.
Re Baxter (1911) 104 L. T. 710.

[No life annuity granted since 25th April, 1855, otherwise than by marriage settlement, has any effect on land, as to purchasers, mortgagees, and creditors, until a memorandum of it has been registered under the Judgments Act, 1855, s. 12. Satisfaction may be entered up under the Crown Debts and Judgments Act, 1860, s. 2. It seems somewhat difficult to distinguish between a rent charge and an annuity charged on land; now that (*semble*) the owner of such an annuity can distrain under the provisions of the Conveyancing Act, 1881, s. 44. And yet a rent charge is real estate (*ante*, Sect. I, Tit. IX, §§ 1287–1294), while an annuity, even though charged on land, is, *semble*, personalty. Probably the point would be settled by the language of the grant (*Re Baxter*, *ubi sup.*).]

(g) *E. of Stafford* v. *Buckley* (1750) 2 Ves. Sen. 170.
Radburn v. *Jervis* (1841) 3 Beav. 540.

[A limitation of an annuity to the annuitant and the heirs of his body creates a fee simple conditional; and, on the birth of issue, the annuitant may aliene in perpetuity (*E. of Stafford* v. *Buckley*, *ubi sup.*, at p. 180, *per* Lord Hardwicke, C.). It seems a little doubtful whether an annuity 'to A for ever' goes to A's heirs or his personal representatives, on his decease. In *Taylor* v. *Martindale*, *ubi sup.*, Shadwell, V. C. E., held the latter view; but declined to lay down a fixed rule.]

Personal liability of grantor

1629. An annuity is created by grant or by testament. It is a question of construction whether the

creator undertakes any personal liability for the payment of the annuity.

Co. Litt. 144, b.
Caine v. *Chapman* (1836) 5 A. & E. 647.

[*Semble:* if an annuity is granted without any reference to any fund out of which it is to be paid, the inference is irresistible, that the grantor binds himself personally to pay it.]

Remedies of annuitant

1630. In addition to his personal remedies (if any) against the creator of the annuity, an annuitant whose annuity was created since 1881, and is charged on land, has the remedies against the land described in Sect. I, Tit. IX, § 1289, *ante*,[a] and, whatever the date of its creation, to the remedies described in Sect. IV, Tit. III, § 1423, *ante*.[b] Whether an annuity charged on land is enforceable against the *corpus* of the land, or only against the income,[c] and whether, in the latter case, it may be raised out of future, or only out of current income,[d] are questions of construction in each case. *Semble*, the terre-tenant of land is not, merely from the fact that an annuity is charged upon the land, personally liable for payment of the annuity.[e]

(a) Conveyancing Act, 1881, s. 44.

[It was held in *Sollory* v. *Leaver* (1871) 40 L. J. Ch. 398, by Malins, V. C., that an annuitant whose annuity was charged on land had a right of distress under the Landlord and Tenant Act, 1730, s. 5. But there seems nothing in the language of that section to justify this view. And it would seem that the terre-tenant of land subject to a perpetual annuity has no right to redeem the annuity (*ante*, Sect. I, Tit. IX, § 1294); for an annuity does not 'issue

out of the land.' He may, however, indirectly get rid of the annuity, by selling the land and applying for leave to pay into Court a sum sufficient to meet the annuity (Conveyancing Act, 1881, s. 5).]

(b) But the remedy, being equitable, is in the discretion of the Court (*Re Tucker* [1893] 2 Ch. 323).

[In the last case, the liabilities are described in the statement of facts as 'rent charges.' But the learned judge speaks of them throughout as 'annuities.']

(c) *Re Young* [1912] 2 Ch. 479.

[It seems now to be regarded as settled that, even where the annuity is stated to be payable 'out of income,' or 'rents and profits,' yet, if there is a disposition of the property 'subject to' the annuity, the corpus will be liable (*Re Howarth* [1909] 2 Ch. 19 (testament); *Re Watkins' Settlement* [1911] 1 Ch. 1 (deed). But see *Re Boulcott* (1911) L. T. 205.]

(d) *Booth* v. *Coulton* (1870) L. R. 5 Ch. App. 684.
Re Boden [1907] 1 Ch. 132.

(e) There does not seem to be any express authority for this proposition; but the absence of authority the other way is very strong. Even the writ of Annuity seems only to have lain against the grantor of the annuity (F. N. B. 121 H., I.). So it would appear that the line of reasoning upon which the Court of Queen's Bench, in *Thomas* v. *Sylvester* (1873) L. R. 8 Q. B. 368, arrived at the conclusion that a terre-tenant was personally liable for a rent charged on his land, would not apply to an annuity (*ante*, Sect. I, Tit. IX, § 1288).

Option to realize

1631. Where a sum of money or other property is bequeathed for the purchase of an annuity,[a] or where there is a direction in a testament to purchase an annuity for the benefit of a specified person,[b] the annuitant or intended annuitant is entitled, in place of having the annuity purchased, to demand immediate payment of the sum bequeathed, or of the amount required to purchase the annuity, as the case may be.

And even if the annuitant or intended annuitant dies before any part of the annuity has become payable, such right passes to his personal representatives;[c] though the annuity was an annuity for the life of the annuitant only.[d]

(a) *Woodmeston* v. *Walker* (1831) 2 Russ. & M. 197.
Re Robbins [1907] 2 Ch. 8.
(b) *Ford* v. *Batley* (1853) 17 Beav. 303.
Re Brunning [1909] 1 Ch. 276.
(c) *Wakeham* v. *Merrick* (1867) 37 L. J. Ch. 45.
(d) *Barnes* v. *Rowley* (1797) 3 Ves. 305.
Bayley v. *Bishop* (1803) 9 Ves. 6.

[A 'restraint on anticipation' (*ante*, Bk. I, § 105) will not prevent the operation of the rule in the text, if the annuitant is unmarried when she makes the demand (*Woodmeston* v. *Walker*, *ubi sup.*). The right to demand payment of the capital does not, however, exist where the annuity is subject to forfeiture on alienation (*Hatton* v. *May* [1876] 3 Ch. D. 148); nor, it would seem, where the annuity is directly created by the testament (*Wright* v. *Callender* [1852] 2 De G. M. & G. 652), except where there is a deficiency of assets (*Re Ross* [1900] 1 Ch. 162). In *Hill* v. *Rattey* [1862] 2 J. & H. 634, the bequest was probably treated as a bequest of capital.]

Apportionment of liability

1632. When an annuity is charged upon two or more separate properties, such properties must, as between their several owners, bear the burden of the annuity in proportion to their respective annual incomes from time to time, and not in proportion to their respective capital values.

Ley v. *Ley* (1868) L. R. 6 Eq. 175.

[The charge in this case was probably a legal rent charge. But the principle would appear to be the same for annuities; though it would seem to be difficult to work in practice. There appears to be no other decision on the point.]

Limitation of time for recovery

1633. An annuity charged on land, or given by way of legacy, cannot be enforced after the lapse of twelve years from the time when a present right to receive the same accrued to a person capable of giving a discharge therefor, or from the giving of a written acknowledgment or part payment to the person entitled to receive the same, or his agent, by the person by whom the same is payable, or his agent;[a] and no action of debt to recover an annuity created by specialty can be brought but within twenty years after the cause of such action.[b]

(a) Real Property Limitation Act, 1874, s. 8.
Re Ashwell (1859) Johns., 112 (on the corresponding section of the Real Property Limitation Act, 1833).
(b) Civil Procedure Act, 1833, s. 3.

[It seems doubtful whether the statutory period under the Real Property Limitation Act runs from the date when the first payment of the annuity was due, or from each date on which an instalment ought to have been paid. The date under the Civil Procedure Act is the latter (*Amott* v. *Holden* [1852] 18 Q. B. 593).]

Recovery of arrears

1634. Not more than six years' arrears of an annuity charged on land can be recovered;[a] but there is no limit (subject to § 1633) to the recovery of arrears of a purely personal annuity.[b]

(a) Real Property Limitation Act, 1833, s. 42.
Hunter v. *Nockolds* (1849) 1 Mac. & G. 640.

[As Wood, V. C., remarked in *Re Ashwell*, *ubi sup.*, at p. 114, it is difficult to see how arrears of an annuity can be described as 'arrears of rent or of interest' within s. 42. But *Hunter* v. *Nockolds* is still treated as law (*Re Lloyd* [1903] 1 Ch., at p. 400).]

(b) *Re Ashwell, ubi sup.*
Darley v. *Tennant* (1885) 53 L. T. 257.

Apportionment of payment

1635. Annuities, not being annual sums made payable in policies of assurance,[a] and not being payable in advance,[b] are, in the absence of express stipulation, deemed to accrue from day to day; but an apportioned part is only recoverable on or after the date when the next payment would in the ordinary course have become payable.[c]

(a) Apportionment Act, 1870, s. 6.
(b) *Trevalion* v. *Anderton* (1897) 66 L. J. Q. B. 489.
(c) Apportionment Act, 1870, ss. 2, 3, 7.

[To the fact that they were recoverable by action of Debt, we probably owe the common law rule, apparently so absurd, that rents, annuities, and other payments due at fixed and stated periods, were not apportionable, and that, consequently, if the title of any creditor expired between the dates of two payments, the current instalment could not be recovered by the creditor or his representatives. This rule was first amended, in respect of rents, by the Distress for Rent Act, 1737, s. 15 (which provided only a partial remedy), and then by the Apportionment Act, 1834, which, however, at least so far as annuities are concerned, is prospective only. These provisions are still in force; but have been practically superseded (after various other efforts) by the Act of 1870, which is retrospective. The curious exception of annuities payable under policies of assurance, so carefully inserted in both the Acts of 1834 and 1870, does not seem very intelligible; and the books on Insurance Law are curiously silent on the point, though Porter (5th edn., p. 113) seems to assume that the 6th section of the Act of 1870 applies exclusively to the payment of premiums. As premiums are invariably made payable in advance, and as section 6 is perfectly unrestricted in its language, this seems rather a bold assumption.]

No action for Crown pension

1636. Where a pension has been granted by the Crown, though in respect of past services, no action will lie against any Crown official for payment of the pension; even though a special fund has been granted

to such official by the Crown for the purpose.[a] The same rule applies to moneys voted by Parliament for the reward of public services.[b]

(a) *Gidley* v. *Lord Palmerston* (1822) 3 B. & B. 275.
Kinloch v. *Sec. of State for India* (1882) L. R. 7 App. Ca. 619.
(b) *Grenville-Murray* v. *E. of Clarendon* (1869) L. R. 9 Eq. 11.

[*À fortiori*, no action will lie against a Crown official for payment of a pension which has not been actually granted (*Edmunds* v. *A. G.* (1876) 47 L. J. Ch. 345).]

Alienation of pensions

1637. Generally speaking, the salary or emoluments of a public office under the Crown, paid out of national funds, are not assignable by the holder, or liable to the payment of his debts.[a] But a pension in respect of past services, in respect of which no liability to future service exists, is (subject to the provisions of any Act of Parliament [b]) assignable, and liable to be taken in execution for debt; [c] and, in the event of the bankruptcy of a public official or pensioner, the Court may (in the case of a public official with the consent of the chief officer of his department) order the payment to the trustee in bankruptcy of such portion of his salary or pension as the Court may think fit.[d] The latter rule applies also to any salary or income not of an official character received by the bankrupt.[e]

(a) *Cooper* v. *Reilly* (1829) 2 Sim. 560.
Ex parte Harnden (1859) 28 L. J. Bky. 18.

[But the restriction is strictly confined to *public* offices, i. e. practically, offices under the Crown paid out of national funds (*In re*

Mirams [1891] 1 Q. B., at p. 596, *per* Cave, J.). Thus it applies to the half-pay of army officers (*Flarty* v. *Odlum* (1790) 3 T. R. 681; *Lidderdale* v. *D. of Montrose* (1791) 4 T. R. 248) which is probably now covered by s. 141 of the Army Act; and to the pay, half-pay, pensions, etc., of officers and men of the royal navy, including marines (Naval and Marine Pay and Pensions Act, 1865, ss. 4 and 5). But it does not apply to the emoluments of a Canonry of Windsor (*Grenfell* v. *Dean and Chapter of Windsor* (1840) 2 Beav. 544); nor to the salary of a workhouse chaplain, payable out of local rates (*In re Mirams*, *ubi sup.*), nor to the income of a college fellowship (*Feistel* v. *King's College*, *Cambridge* (1847) 10 Beav., 491).]

(b) e. g. the last-mentioned statute, the Army Act, s. 141, and the Old Age Pensions Act, 1908, s. 6. The pension of a retired ecclesiastical incumbent is also made unassignable by statute (Incumbents Resignation Act, 1871, s. 10).

(c) *Dent* v. *Dent* (1867) L. R. 1 P. & D. 366.
Willcock v. *Terrell* (1878) 3 Ex. D. 323.
Knill v. *Dumergue* [1911] 2 Ch. 199.

(d) Bankruptcy Act, 1883, s. 53 (1).
Re Lupton [1912] 1 K. B, 107.

(e) *Ibid.* (2).

TITLE IV — SHARES, STOCKS, AND DEBENTURES

Shares

1638. For the purposes of this Title, a share means an aliquot undivided part, of a specific nominal value, of the capital of an association (not being a partnership as defined in Bk. II, Pt. II, § 584, *ante*), whether incorporated or not,[a] existing for the purpose of carrying on an undertaking, whether for profit or not, and whether such capital or any part of it, remains uncalled up, or not.[b] Where the whole of the nominal value represented by the share has been paid, or is deemed to have been paid, into the funds of the association, the share is said to be 'fully paid'; whether or not any further liability for calls remains upon it.[c] All shares in companies incorporated under the Companies Clauses Consolidation Act, 1845,[d] or the Companies (Consolidation) Act, 1908,[e] are personal estate; and each must be distinguished by an appropriate number,[f] and registered in the name of the holder in the books of the company.[g]

(a) It seems quite clear that there may be shares in an unincorporated society, e. g. a building society certified under 6 & 7 Will. IV (1836) c. 32. Such societies are treated as still governed by the provisions of that statute; unless they have been incorporated under later legislation (Building Societies Act, 1894, s. 25 (2)).

(b) *Borland's Trustee* v. *Steel Bros.* [1901] 1 Ch., at p. 288.

[The definition in the text is, it is submitted, a fair, though not, perhaps, a literal interpretation of the expressions of Farwell, J., in the above case; but neither statute, nor, it is believed, judicial authority, has favoured the public with a formal definition of a 'share.' * In the earlier Companies Acts (e. g. that of 1844, s. 2), great stress was laid on the fact that a share was transferable without the consent of the holders of other shares in the undertaking; and this fact, doubtless, so far as it is true, does very readily distinguish an incorporated company from a private partnership. But, inasmuch as, in the case quoted, Mr. Justice Farwell held, that provisions in a company's articles of association forbidding the transfer of shares to outsiders so long as certain persons connected with the company were willing to purchase, were lawful, and inasmuch as such provisions are now extremely common (being, indeed, expressly recognized by s. 121 of the Companies Act, 1908), the free transferability of shares can hardly be said to be an essential feature of their existence.]

(c) e. g. where the company is one with unlimited liability.
(d) *Ibid.*, s. 7.
(e) *Ibid.*, s. 22 (1).
(f) Companies Clauses Consolidation Act, 1845, s. 6.
Companies (Consolidation) Act, 1908, s. 22 (2).
(g) Companies Clauses Consolidation Act, 1845, ss. 8, 9.
Companies (Consolidation) Act, 1908, s. 25.

[Practically speaking, almost all corporations carrying on undertakings for commercial profit, as distinguished from mutual convenience and benefit, are governed by the provisions of one or the other of these last two statutes. Persons may be incorporated for the purpose of trade or otherwise by Letters Patent under the provisions of the Chartered Companies Act, 1837, as amended by the Chartered Companies Act, 1884; but, though such corporations frequently raise capital by shares, the nature and conditions of such shares are usually made the subject of special provisions in the charter of incorporation, and have little in common with ordinary commercial shares. Shares may exist in 'building,' 'provident,' 'industrial,' and similar societies; and such societies are often corporations (Building Societies Act, 1874, s. 9; Industrial and Provident Societies Act, 1893, s. 21). But their so-called 'shares' also bear little analogy to ordinary commercial shares. On the other hand, shares in companies formed by private Acts of Parlia-

* By s. 285 of the Companies (Consolidation) Act, 1908, "share" means "share in the share capital of the company." This effort can hardly be described as a definition.

ment for carrying on public or quasi-public undertakings, e. g. waterworks, railways, &c., are very like ordinary commercial shares; being largely regulated by the provisions of the Companies Clauses Act, above referred to. By a recent provision, companies may be authorized to issue share warrants to bearer; with the result that the names of the owners of the shares affected need not appear on the register (Companies (Consolidation) Act, 1908, s. 37).]

'Preferred' and 'deferred' shares

1639. A 'preference share' means a share the holder of which is entitled to participate in the profits of the undertaking in priority to another class or other classes of share-holders;[a] and a 'deferred share' means a share whose holder is postponed, in the distribution of such profits, to another class or other classes of share-holders.[b] Subject to the terms of its memorandum or articles of association, a company registered under the Companies (Consolidation) Act, 1908, may (*semble*) create preference shares;[c] but the number of deferred shares created or proposed to be created must be stated in every prospectus issued by or on behalf of such company.[d]

(a) The term 'preference share' is statutory (Companies Clauses Consolidation Act, 1863, s. 13). It is also familiar in practice, and has been used freely in the Courts. But there would seem to be no authoritative definition of it.

(b) This expression is also used, though not defined, in s. 81 (a) of the Companies (Consolidation) Act, 1908.

(c) *McIlquham* v. *Taylor* [1895] 1 Ch., at p. 60, *per* Stirling, J.

(d) Companies (Consolidation) Act, 1908, s. 81 (a).

Stock

1640. 'Stock' differs from shares in the facts, that (i) subject to the regulations affecting any

particular issue, it may be held and divided into unequal amounts of any extent,[a] and that (ii) no liability for the subscription of further capital, by calls or otherwise, can exist with regard to it.[b] Any company registered under the Companies (Consolidation) Act, 1908, may, if so authorized by its articles, convert all or any of its paid-up shares of any denomination;[c] and any company governed by the provisions of the Companies Clauses Consolidation Act, 1845, may, in manner provided by that Act, convert or consolidate all or any part of the shares then existing in the capital of the company, and in respect whereof the whole money subscribed shall have been paid up, into a capital general stock, to be divided among the shareholders according to their respective interests therein.[d]

(a) This is the special convenience of stock, that it may be dealt with in any amount, however small (*Ex parte Copeland* (1852) 2 De G. M. & G., at p. 918, *per* Cranworth, L. J.). Of course the term 'stock' is applicable to bodies, no shares in which could possibly be issued, e. g. the Commissioners of the National Debt and the Government of a colony.

(b) That this is the essential feature of stock as distinguished from shares, to which a liability for unpaid calls may attach, may be seen by reference to s. 50 of the Trustee Act, 1893, by virtue of which the expression 'stock' in the statute includes fully paid-up shares.

(c) Companies (Consolidation) Act, 1908, s. 41 (1) (c).

(d) Companies Clauses Consolidation Act, 1845, s. 61.

1641. The legal title to shares and stock in companies governed by the Companies Clauses Consolida- *Transfer*

tion Act, 1845, and the Companies (Consolidation) Act, 1908, and to British Government stock, can be acquired only by transfer registered in the books of the company, or by transfer in the books of the Bank of England respectively.[a] But a company limited by shares, and registered under the Companies (Consolidation) Act, 1908, may, if so authorized by its articles of association, issue under its common seal a warrant stating that the bearer of the warrant is entitled to any fully paid-up shares or stock therein specified; and such share warrant will entitle the bearer thereof to the shares or stock therein specified, and, on surrendering it for cancellation, to have his name entered as a member in the register of members.[b]

(a) Companies Clauses Consolidation Act, 1845, s. 15.
National Debt Act, 1870, s. 22.
Companies (Consolidation) Act, 1908, s. 28.
(b) *Ibid.*, s. 37.

[It is impossible to enumerate all the statutes applicable to transfers of different kinds of shares and stock; but the requirement of registration will be found to be universal. As to the form of transfer, legal requirements are much less uniform. The shares of companies governed by the Act of 1845 (*supra*) require a deed (*ibid.*, s. 14); those under the Act of 1908 are transferable 'in manner provided by the articles of the company' (Act of 1908, s. 22 (1.)). Government stock may now be made transferable by deed; and no stamp duty is payable thereon (Finance Act, 1911, s. 17). A certificate, under the seal of the company, specifying any shares or stock held by a member, is *primâ facie* evidence of the title of such member to such shares or stock in a company registered under the Companies (Consolidation) Act, 1908 (*ibid.*, s. 23). But the register of members itself is also '*primâ facie* evidence of any matters by this Act directed or authorized to be inserted therein'—which would certainly include the ownership of shares and stock (*ibid.*, s. 33).]

No transfer while calls unpaid

1642. No share in any company governed by the provisions of the Companies Clauses Consolidation Act, 1845, may be transferred, after a call has been made in respect thereof, until such call has been paid, as well as all calls for the time being due on any share held by the intending transferor.

Companies Clauses Consolidation Act, 1845, s. 16.

[There seems to be no corresponding provision in the Companies (Consolidation) Act, 1908; but such a provision in the articles of association is now assumed unless the contrary appears (Table A, Art. 20). As between the company and the share-holder, the person liable to pay the call is the person whose name was on the register when the call was made (*Re National Bank of Wales* [1897] 1 Ch., at p. 306, *per* Lindley, L. J.). And the transferor of shares upon which a liability for the payment of uncalled up capital remains, may be liable, in the event of the company being wound up within a year of the transfer, to the extent specified in s. 123 of the Act of 1908.]

Blank transfer

1643. A good equitable title to shares or stock in companies registered under the Companies (Consolidation) Act, 1908, may be made, whether absolutely or by way of mortgage, by the execution by the alienor of a transfer of the shares or stock without filling in the name of the alienee, and the handing of such blank transfer, and the stock or share certificate, to the alienee.

Ex parte Sargent (1873) L. R. 17 Eq. 273.
France v. *Clark* (1883) 22 Ch. D. 830.
Colonial Bank v. *Cady* (1890) L. R. 15 App. Ca., at p. 285, *per* Lord Herschell.
Hooper v. *Herts* [1906] 1 Ch. 549.
Fuller v. *Glyn Mills* [1914] 2 K. B. 168.

[And if the transferor improperly interferes to prevent the transferee getting himself registered as legal owner, he will be liable in

damages (*Hooper* v. *Herts*, *ubi sup.*). It is the unfortunate habit of text-book writers, and even of judges, to speak of a transfer of the kind described in this § as a 'pledge'—a practice which obscures the true nature of the transaction. Doubtless, if the transaction is by way of mortgage, the transferee becomes a pledgee of the documents handed over; but he also acquires title to the shares or stock (*Fry* v. *Smellie* [1912] 3 K. B. 282). No notice of any equitable interest can, however, be entered on the company's register (Companies [Consolidation] Act, 1908, s. 27).]

Lien for calls

1644. A company may have a lien on the shares (other than fully paid shares) held by any of its share-holders, in respect of unpaid calls, or other moneys due from such share-holders to the company. In the absence of provision to the contrary in the articles of association of a company registered under the Companies (Consolidation) Act, 1908, such a lien will be deemed to have arisen; and the company may sell the shares after fourteen days' notice, to reimburse itself the moneys due.

Companies (Consolidation) Act, 1908, Sched. I, Table A, Artt. 9–11.

[Similarly, in the absence of special provision, the company may refuse to register transfers of shares on which it has a lien (*Ibid.* Art. 20). The right of the company to forfeit shares for non-payment of calls (which, in the case of companies under the Companies Clauses Act, 1845, is statutory (s. 29)) exists also in the case of companies under the Act of 1908, unless the provisions of Table A are excluded (Table A, Artt. 24–26).]

Definition of debenture

1645. A debenture, for the purposes of this Title, means an acknowledgment (not necessarily under seal[a]) of indebtedness by an association, whether in-

corporated or not,[b] and whether including a charge on the assets of the association, or not.[c] Such acknowledgment must be for a specific sum of money; but, if it includes a charge on the assets of the association, such charge may be made to trustees on behalf of a series of debenture holders, or it may be made directly to the holder of the debenture.[d]

(a) *B. I. Steam Navigation Co.* v. *Inland Revenue* (1881) 7 Q. B. D. 165.

(b) In the last-mentioned case, Grove, J., remarked that he did not "remember the term being used otherwise than in an acknowledgment of indebtedness by a corporate body" (p. 168). But the learned judge admitted that there was no official definition of the term 'debenture'; and, as a matter of fact, 'debentures' are sometimes issued by non-corporate associations. Indeed it is not certain that an individual cannot issue debentures. Even the use of the word 'debenture' is not essential (*Edmonds* v. *Blaina Furnaces Co.* [1887] 36 Ch. D., at p. 220, *per* Chitty, J.).

(c) *Edmonds* v. *Blaina Furnaces Co.*, *ubi sup.*, at p. 219.
Jackson v. *Rainford Coal Co.* (1896) 2 Ch., at p. 344, *per* Chitty, J.).

[In fact the document decided in *British India Steam Navigation Co.* v. *Inland Revenue*, *ubi sup.*, contained no charge or agreement to give one.]

(d) *Re Uruguay, &c. Ry. Co.* (1879) 11 Ch. D. 372.
Re Olathe Silver Mining Co. (1884) 27 Ch. D. 278.

[Where the sum secured by the acknowledgment is an indivisible sum, the security is known as a 'debenture'; where it is a divisible sum which may be held in any quantity not exceeding the total amount owing by the association on the same security, it is called 'debenture stock'.]

Power to issue debentures

1646. Generally speaking, and in the absence of provision to the contrary expressed or implied in its memorandum or articles of association,[a] an ordinary

trading company has the right to borrow money for the purposes of its business, and to issue debentures therefor.[b]

(a) *Re General Provident Co.* (1869) 38 L. J. Ch. 320.

[The head note of this report is far too wide.]

(b) *Australian Auxiliary Co.* v. *Mounsey* (1858) 4 K. & J. 733. *Bryon* v. *Metropolitan Co.* (1858) 3 De G. & J. 123.

[These two cases were expressly followed in *General Auction Co.* v. *Smith* [1891] 3 Ch. 432, where, however, it was not proposed to issue debentures. Apparently, public undertakings governed by the Companies Clauses Acts have no power to borrow on debentures without express authorization (Companies Clauses Act, 1863, s. 22). Special authority in the memorandum or articles of association is also required for charging uncalled capital (*Re Pyle Works* (1890) 44 Ch. D. 534; *Newton* v. *Anglo-Australian Invest. Co.* [1895] A. C. 244). 'Reserve capital' (i.e. capital which can only be called up in the event of the association being wound up) cannot be charged by an issue of debentures (Companies (Consolidation) Act, 1908, s. 59; *Re Mayfair Property Co.* [1898] 2 Ch. 28); and the capital of a company limited by guarantee is in a similar position (*Re Irish Club Co.* [1906] W. N. 127). But a company governed by the Companies Clauses Act, 1845, which has power by its special Act to borrow on mortgage or bond, has power to charge its uncalled capital (Act of 1845 s. 38).]

Floating charge

1647. Where debentures comprise a charge on the assets of an association, such charge may be a fixed charge on specific assets, or it may be a 'floating charge' on the assets of the association generally, present and future, or it may comprise both such kinds of charges. A floating charge will become a fixed charge on the assets then actually belonging to

the association, on the occurrence of the event or events agreed upon as fixing the charge.

Governments Stock v. *Manila Ry. Co.* [1897] A. C., at p. 86, *per* Lord Macnaghten.
Re Yorkshire Woolcombers' Association [1903] 2 Ch., at p. 295, *per* Romer, L. J.
Cox Moore v. *Peruvian Corpn.* [1908] 1 Ch. 604.
Evans v. *Rival Granite Quarries* [1910] 2 K. B., at p. 999, *per* Buckley, L. J.
De Beers v. *British S. A. Co.* [1912] A. C. 52.

[A mere charge, even on specific assets, would only bind such assets in equity, i. e. as against persons acquiring them with knowledge of the charge, and against persons not acquiring the legal title. (*In re Morrison* [1914] 1 Ch. 50.) But, in fact, a debenture trust deed usually comprises a legal conveyance of specific assets. *Inter se*, debenture-holders presumably rank in order of date; unless, as is common though not essential (*Levy* v. *Abercorris Slate Co.* (1887) 37 Ch. D., at p. 264, *per* Chitty, J.), the debentures are issued in a series, and it is provided that all in the series shall rank *pari passu*. If an earlier series of debentures comprises a floating charge on future-acquired assets, and a later series a specific charge on assets acquired between the two dates, but subject to the rights of the earlier series, the floating charge of the earlier series will, as respects such assets, take priority over the specific charge of the later (*Re Stephenson & Co.* (1912) 107 L. T. 33).]

Registration of debentures

1648. Debentures issued by companies governed either by the Companies Clauses Act, 1863, or by the Companies (Consolidation) Act, 1908, must be registered in compliance with the terms of those statutes respectively.[a] Unregistered debentures of the latter class of companies will be void against the liquidator or any creditor of the company.[b] Any mortgage debenture secured upon land or charges thereon within the meaning of the Mortgage De-

benture (Amendment) Act, 1870,[c] by any company governed by the provisions of the Companies Act, 1908, must be registered with the Registrar of the Land Registry and be duly indorsed by him; otherwise it will not create a charge on the registered securities of the company.[d]

(a) Companies Clauses Act, 1863, s. 28. (Apparently, in such cases, the company keeps the register, which is, however, open to inspection by certain classes of persons.)
Companies Act, 1908 s. 93. (In these cases, the register is kept by the Registrar of Joint Stock Companies.)
(b) *Ibid.* Apparently, in the case of companies governed by the Companies Clauses Acts, there is no penalty for failure to register.
(c) See s. 4 of that Act for the list of securities included.
(d) Mortgage Debenture Act, 1865, s. 33. (The company must keep a register of the securities which are registered at the Land Registry as being securities on which it is entitled to raise money by debentures (s. 27).)

Foreclosure by debenture-holders

1649. Debenture-holders of a company incorporated under the Companies (Consolidation) Act, 1908, having a direct charge (fixed or floating) on the assets of the company, have, in addition to the ordinary remedies of a person having a charge on property (*ante* Sect. IV, Tit. III, § 1423) the right to foreclose the property included in the charge.[a] But holders of debentures secured by a covering deed in favour of trustees (*ante*, § 1645 n.) are only entitled to a decree for the appointment of a receiver, enquiry as to amounts due to the various classes of debenture-holders, and directions for realization;[b] and no order for foreclosure can in any case be made,

unless all the debenture-holders entitled *pari passu* demand it.[c]

(a) *Welch* v. *National Cycle Co.* [1886] W. N. 96.
Sadler v. *Worley* [1894] 2 Ch. 170.

[In the case of a floating charge, Lord Atkinson, in *De Beers* v. *B. S. A.* [1912] A. C., at p. 70, expressed an opinion adverse to the possibility of foreclosure. And it seems extremely doubtful whether the rule applies to a public undertaking specially authorized by statute; even when carried on by a company incorporated under the Companies Act. At any rate, the Court refused to order a sale in such a case (*Blaker* v. *Herts & Essex Waterworks Co.* (1889) 41 Ch. D. 399); and it seems quite clear that neither foreclosure, nor sale, nor *semble*, even the appointment of a manager, can be obtained against a company carrying on a public undertaking under the Companies Clauses Act, 1845 (*Gardner* v. *L. C. & D. R.* (1866) L. R. 2 Ch. App. 201).]

(b) The proper form of action is by one or more holders on behalf of themselves and the others (see the form in Palmer, *Company Precedents*, I, 1354). The trustees should be made defendants (*Mortgage Insurance Corpn.* v. *Canadian Co.* [1901] 2 Ch. 377). In the case of companies issuing debenture stock under the Companies Clauses Act, 1863, the right to a receiver is statutory in certain circumstances (*ibid.* ss. 25, 26).

(c) *Re Continental Oxygen Co.* [1897] 1 Ch. 511.

Enforcement of debentures

1650. Subject to the terms of the debenture, a debenture-holder is entitled to commence proceedings to enforce his security — (*a*) when the payment of principal is in arrear,[a] (*b*) when it can be proved to be in jeopardy, whether payment is in arrear, or not.[b]

(a) *Wallace* v. *Universal Automatic Machines Co.* [1894] 2 Ch. 547.

[It seems doubtful whether the mere fact that interest is in arrear, is sufficient.]

(b) *Re Panama Co.* (1870) L. R. 5 Ch., at p. 322, *per* Giffard, L. J.
Hodson v. *The Tea Co.* (1880) 14 Ch. D. 859.
Re Crigglestone Coal Co. [1906] 1 Ch. 523.

[The most obvious way of proving that the security is in danger is by showing that the association is being wound up. But it is not the only way.]

Transfer of debentures

1651. A mortgage debenture created under the provisions of the Mortgage Debenture Act, 1865, may be transferred by indorsement in the form specified in the Schedule to that Act.[a] Debenture stock created under the provisions of the Companies Clauses Act, 1863, is transmissible and transferable in the same manner as other stock of the company, and has in all other respects the incidents of personal estate.[b] A debenture payable to bearer is a negotiable instrument, and passes by delivery, independently of equities.[c]

(a) Mortgage Debenture Act, 1865, s. 37, Sched. (Form E).
(b) Companies Clauses Act, 1863, s. 23.
(c) *Bechuanaland Co.* v. *London Trading Bank* [1898] 2 Q. B. 658.
Edelstein v. *Schuler* [1902] 2 K. B. 145.

[*Semble:* other debentures are transferable in the same manner as choses in action generally (See *post*, Sect. XIV). Would the rule in the text apply to debentures of a private company not dealt with on the Stock Exchange?]

Redemption of debentures

1652. An association which has issued debentures comprising a charge on any part of its assets, may redeem them at any time after the day fixed for pay-

ment of the sums for which the debentures are security; and any 'clog' on the equity of redemption (*ante*, Sect. IV, Tit. II, § 1415) will be void.[a] But a debenture issued by a company registered under the Companies (Consolidation) Act, 1908, may, by its express terms, be made irredeemable, or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long.[b]

(a) *Samuel* v. *Jarrah Corporation* [1904] A. C. 323.
British S. Africa Co. v. *De Beers* [1910] 2 Ch. 502.

[Some doubts were thrown on the applicability of the doctrine of 'clog' to debentures creating only a floating charge, in the House of Lords on the hearing of the appeal in the *De Beers Case* ([1912] A. C., at p. 70, *per* Lord Atkinson, at p. 71, *per* Lord Halsbury, at p. 73, *per* Lords Loreburn and Gorell). Lord Atkinson, however, based his doubt at least partly on the argument that a debenture-holder had no right of foreclosure — an argument inconsistent with decided cases (*ante*, § 1649); and the Court of Appeal, in *Kreglinger* v. *New Patagonia Co.* (1913) XXIX T. L. R. 464, considered itself bound by the earlier decisions to hold that the doctrine of the 'clog' applied to a floating charge. On appeal to the House of Lords, that decision was reversed, but without reference to the applicability of the doctrine ([1914] A. C. 25).]

(b) Companies (Consolidation) Act, 1908, s. 103.

Contract to take up debentures

1653. Notwithstanding the provisions of Bk. II, Pt. II, Sect. III, Tit. II, § 444, *ante*, a contract with a company registered under the Companies (Consolidation) Act, 1908, to take up and pay for any debentures of the company, may be enforced by an order for specific performance.

Companies (Consolidation) Act, 1908, s. 105.

[Generally speaking, a contract to lend or borrow money is not specifically enforceable; and this doctrine was applied to a contract to take up debentures (*S. A. Territories* v. *Wallington* [1908] A. C. 309). The change in the law indicated in the text was made by the Companies Act, 1907, s. 16.]

Scrip

1654. A 'scrip certificate' is a written acknowledgment by the promoters of a company, or undertaking, or loan, of the right of the person named in it, or the holder of the certificate, to a specified number or amount of shares, stock, or debentures. Such certificate may be either absolute, or conditional upon some event happening ('provisional certificate'). Where the certificate is in favour of the 'holder,' the benefit of such certificate is legally transferable by mere delivery of the certificate.

Barclay's Case (1859) 26 Beav. 177.
Mexican and South African Co. (1859) 4 De G. & J. 544.

[Generally speaking, 'scrip' is a temporary arrangement, only resorted to during the formation of a company, or the flotation of stock, loans, or debentures; and it is doubtful whether 'scrip-companies' — i. e. so-called companies the bulk of whose members never actually take up their shares, would not be ordered to be wound up under s. 129 (vi) of the Companies Act, 1908 (*Princess of Reuss* v. *Bos* (1871) L. R. 5 H. L., at pp. 201–2, *per* Lord Cairns). The important point is, of course, that a mere scrip-holder cannot, except in special circumstances, be made a contributory in the winding up of the company (*Ormerod's Case* (1867) L. R. 5 Eq. 110). It is stated generally in Lindley on *Companies* (6th ed., p. 650), that scrip is transferable by delivery of the certificate. But the cases quoted were concerned with certificates to 'holder.']

Definition of patent

1655. A patent, for the purposes of this Title, means the exclusive right of making, using, exercising, and vending a manufacture new within the realm.[a] Such a right can only be granted to the true and first inventor or inventors of such manufacture, and for a period not exceeding fourteen years;[b] but, in the discretion of the Court, the period may be extended for a further time not exceeding fourteen years.[c] All other monopolies of buying, selling, making, and working, or using anything within the realm, and all other monopolies of any kind, are, unless authorized by Act of Parliament, utterly void.[d]

(a) i. e. within the United Kingdom and the Isle of Man (*Brown* v. *Annandale* (1842) 8 Cl. & F. 437; Patents and Designs Act, 1907, s. 14).

(b) Statute of Monopolies (1623) ss. 1, 6.
Patents and Designs Act, 1907, s. 17 (1).

(c) *Ibid.* s. 18. (The extension is usually only for seven years; but 'in exceptional cases' it may be up to fourteen, *ibid.* (5). A patent may be extended as to one or more of its clauses (*Re Lodge's Patent* [1911] 2 Ch. 46)).

(d) Statute of Monopolies (1623) s. 1.

[The granting of patents was, at one time, subject to much abuse; and the matter roused great feeling, which finally found its expression in the statute of 1623. This statute is still in force as the basis of patent law; and the definition of 'invention' is, in the latest legislation (Act of 1907, s. 93) still incorporated by reference to it. But a somewhat careless judicial interpretation of the permissive clause of the old statute (s. 6) led to further abuses, which

have been recently remedied by the provision set out in § 1660 (iii) *post*. In theory, a patent is a privilege voluntarily granted by the favour of the Crown (Act of 1907, s. 97). In fact, it is claimable as of right by any applicant who fulfils the prescribed conditions (Act of 1907, ss. 1–13).]

Infringement of patent

1656. The owner of a lawful patent ('patentee') has a *primâ facie* right to recover damages, or to have an account of profits, and an injunction against future infringements, against any person who infringes his monopoly, within the United Kingdom and the Isle of Man.[a] But where a defendant proves that, at the date of the infringement, he was not aware, and had no reasonable means of making himself aware, of the existence of the patent, the patentee will not be entitled to recover damages in respect of the infringement.[b]

(a) Patents and Designs Act, 1907, s. 14. (Since the passing of the Chancery Amendment Act, 1858, the patentee has been able to obtain all his remedies in a single action. But there is still a shadow of a doubt whether he could get an account if his patent had actually expired, or was about immediately to expire, at the hearing of the action; because it would be useless to grant an injunction in such a case, and, historically, an account is ancillary to an injunction (*Betts* v. *Gallais* (1870) L. R. 10 Eq. 392).)

[It has previously been pointed out (*ante*, Bk. II, Pt. III, Sect. III, Tit. IV. § 891 n.) that a threat of an action for infringement, not duly followed up, is itself a ground of action by any person aggrieved (Act of 1907, s. 36).]

(b) Patents and Designs Act, 1907, s. 33.

Definition of infringement

1657. Any unlicensed making,[a] using,[b] or selling[c] of a patented article, or any other act which in fact makes use of the invention protected by the

patent,[d] is, *primâ facie*, an infringement of such patent.

(a) *Sykes* v. *Howarth* (1879) 12 Ch. D. 826.

[The making must be for use or sale, not merely for experiment (*Frearson* v. *Loe* (1878) 9 Ch. D., at pp. 66–67, *per* Jessel, M. R.).]

(b) *Nobel's Explosives Co.* v. *Jones* (1881) 17 Ch. D., at p. 741, *per* James, L. J.
Saccharin Co. v. *Jackson* (1903) 20 R. P. C. 611.

(c) Mere exposure for the purposes of sale is sufficient to amount to an infringement (*British Motor Syndicate* v. *Taylor & Sons* [1901] 1 Ch. 122).

(d) *Nobel's Explosives Co.* v. *Anderson* (1894) 11 R. P. C., at p. 128, *per* Romer, J.

Patent binds Crown

1658. A patent binds the Crown to the same extent as it binds a subject; except that any Government department may use the invention protected by it on such terms as may be agreed, with the approval of the Treasury, between the department and the patentee, or, in default of agreement, on such terms as the Treasury may settle, after hearing all parties interested.

Patents and Designs Act, 1907, s. 29.

[There is provision for the assignment of inventions or improvements in instruments or munitions of war to a Secretary of State or the Admiralty, and for concealment of the details of the process in such cases, even though covered by a patent (*ibid.* s. 30). Generally speaking, the very object of the Register of Patents is to afford facilities for publicity (s. 67).]

1659. A patentee may grant licenses to any persons to exercise his invention; and such persons will

not, whilst acting in accordance with the terms of such licenses (express or implied), be guilty of infringing the patent.[a] If the Court is convinced, on a reference by the Board of Trade granted on the petition of a person interested, that the reasonable requirements of the public with reference to the invention have not been satisfied, it may order the patentee to grant licenses on such terms as the Court may think just; or, if the Court is of opinion that such requirements will not be satisfied by the grant of licenses, it may revoke the patent.[b]

(a) Certain conditions cannot be included in licenses (Patents and Designs Act, 1907, s. 38). And a license to sell, or a sale by a patentee, includes an implied license to the purchaser to sell again (*Mc Gruther* v. *Pitcher* [1904] 2 Ch., at p. 312, *per* Cozens-Hardy, L. J.).
(b) Patents and Designs Act, 1907, s. 24.

Revocation of patent

1660. A patent may also be revoked on one or more of the following grounds, viz.: —

(i) that it was granted, in the first instance, for an invention not satisfying the requirements of the Statute of Monopolies, or to a person not entitled to the grant;

Patents and Designs Act, 1907, s. 25 (3).

(ii) that it was irregularly obtained;

Nuttall v. *Hargreaves* [1892] 1 Ch. 23.

(iii) that, at any time not less than four years after the date of the patent, the patented

article or process is manufactured or carried on exclusively or mainly outside the United Kingdom.

Patents and Designs Act, 1907, s. 27.

[The objection to the validity of a patent, or the claim for its revocation, may be taken or made either as a defence to an action of infringement (Patents and Designs Act, 1907, ss. 25 (2), 32), or by application to the Comptroller of Patents (*ibid.* s. 26), or by petition to the Court (*ibid.* s. 25 (1)). An appeal lies from the Comptroller to the High Court (*ibid.* ss. 26 (4), 27). *Semble*, an appeal also lies from the decision of the High Court where (i) the decision is on appeal from the Comptroller's order for the revocation of a patent on any ground on which the grant of such patent might have been opposed (Patents and Designs Act, 1907, s. 92 (2)), or (ii) where the decision is on any petition for revocation presented to the High Court itself (Act of 1908, s. 1).]

Lapse of patent

1661. A patent lapses if the patentee fails to pay the prescribed fees within the prescribed times:[a] but, if the failure to pay was unintentional,[b] the patent may be restored by the Comptroller on the application of the patentee, after due notice to the public, and with due protection to persons who may have availed themselves of the subject-matter of the patent after it was announced as void in the Official Journal.[c]

(a) Patents and Designs Act, 1907, s. 17 (2).
(b) *Ibid.* s. 17 (3).
Re Land's Patent [1910] 2 Ch. 236.

[The Act merely requires that the application shall state that the non-payment was unintentional. But the decision covers the view in the text.]

(c) Patents and Designs Act, 1907, s. 20 (5).

Assignment of patent

1662. (*Semble*) the legal title to a patent can only be assigned by deed. But an equitable assignment of a patent, being in writing, may be entered on the Register of Patents.

Re Casey's Patents [1892] 1 Ch. 104.

[It seems curious that the Act is silent on the form of assignment; and the expression of opinion by the Court in the case quoted was really *obiter* as regards the first proposition in the §. The Register is only *primâ facie* evidence of title (Patents and Designs Act, 1907, s. 28 (3)). Mortgages and licenses, but not trusts, may also be registered (*ibid.* ss. 66, 71 (2)).]

Design

1663. A 'design,' as referred to in this Title, means a new and original design for the pattern, shape, configuration, or ornament, or for any two or more of such purposes, of any article of manufacture or substance (not being a design for a sculpture within the protection of the Copyright Act, 1911 (*post*, Tit. VII)), which design is registered under the provisions of the Patents and Designs Act, 1907.

Patents and Designs Act, 1907, ss. 49, 93.

[The fact that the design has been confidentially disclosed and subsequently published in breach of good faith before registration, and even the acceptance of a first and confidential order for goods bearing a *textile* design intended for registration, will not be fatal to the application to register (*ibid.* s. 55). Neither will the fact that the design, or goods made from it, has or have been exhibited at a certified industrial exhibition; if due notice of the applicant's intention to exhibit has been given to the Comptroller of Patents, and the application for registration has been made within six months of the opening of the exhibition (*ibid.* s. 59).]

1664. Such registration confers in the first instance copyright in the design for a period of five years from its date; and such copyright will, on due application and payment of the prescribed fees, be renewed for a second and third period of five years. *Effect of registration*

Ibid. s. 53.

[The applications for registration and renewal are made to the Comptroller of Patents, subject to an appeal to the Board of Trade (*ibid.* s. 49).]

1665. During the existence of such copyright, or such shorter period (not being less than two years from the date of registration) as may be prescribed, the design is not open to inspection by the public; but any person furnishing sufficient information to enable the Comptroller of Patents to identify the design, and paying the prescribed fee, is entitled to be informed whether registration still exists, and in respect of what classes of goods, and of the date of registration, and of the name and address of the proprietor of the design. *Protection of registered design*

Ibid. ss. 56, 57.

1666. If, during the existence of such copyright, any person (*semble*, within the United Kingdom or the Isle of Man), except with the license or written consent of the registered proprietor of the design, for the purposes of sale applies, or causes to be applied, to *Infringement of design*

any article in any class of goods in respect of which the design is registered, the design itself or any fraudulent or obvious imitation thereof, or if, knowing that any such design or imitation has been applied without the consent of the registered proprietor of the design, any person publishes or exposes, or causes to be published or exposed for sale, such article, such person will be liable to pay to such registered proprietor a sum not exceeding £50, recoverable as a simple contract debt, or, at the option of the registered proprietor, to an action for damages and an injunction.

Ibid. s. 60.

But: —

(i) the total sum recoverable as a simple contract debt in respect of any one design will not exceed £100;

Ibid.

(ii) the registered proprietor will not be able to recover any penalty or damages in respect of a breach of copyright of such design, unless he has caused (or shows that he took all proper steps to ensure such result) each article delivered by him on sale, to which such design has been applied, to be marked with the prescribed mark, words, or figures, denoting that such design is registered, or unless he shows that the infringement in question was committed after the infringer

knew, or had received notice, of the existence of the copyright in such design.

Ibid. s. 54.

[The provision as to 'threats actions' applicable to patents (*ante*, § 1656, n.), is applicable also to registered designs (s. 61); and registration may be cancelled at any time by the Comptroller, without appeal, on the ground that the design is used for manufacture exclusively or mainly outside the United Kingdom (s. 58).]

Transfer of design

1667. *Semble*, the proprietorship of a registered design may be assigned by deed, writing, or word of mouth;[a] but the assignee cannot sue in respect of alleged infringement of the design, until he is entered as proprietor on the Register of Designs.[b]

(a) There is nothing in the statute or rules requiring the assignment to be in any particular form; but, possibly, the provisions of the Judicature Act, 1873, s. 25 (6) (*post*, Sect. XIV, Tit. I, § 1698), may by implication require a writing.

(b) *Woolley* v. *Broad* [1892] 1 Q. B. 806.

TITLE VI—TRADE MARKS, TRADE NAMES, AND GOODWILL

Trade mark

1668. A trade mark, for the purposes of this Title, means any distinctive device, sign, or badge, used or proposed to be used upon or in connection with goods, for the purpose of indicating that such goods are the goods of the proprietor of such device, sign, or badge, by virtue of manufacture, selection, certification, dealing with, or offering for sale.

Trade Marks Act, 1905, s. 3.

Registration of trade marks

1669. A trade mark which satisfies the requirements of the Trade Marks Act, 1905, may be registered in the Register of Trade Marks at the Patent Office. Such mark is then known as a 'registered trade mark.'

Ibid. ss. 3, 4, 12–18.

[The qualifications of a registrable trade mark are set out in ss. 8–11 of the Act of 1905. The chief requirements are that it must be (i) applicable only to particular goods or classes of goods, (ii) distinctive (identical or closely resembling trade marks cannot be registered (s. 19)), (iii) not deceptive, immoral, or scandalous. A trade mark may be limited to one or more colours; but, in the absence of express limitation, it will be deemed to apply to all colours (s. 10). There is an attempt in the Act (s. 9) to set out the alternative forms, one of which a registrable trade mark must assume; but the definitions are so wide as to include almost every possible form, except a name or signature to which the applicant is in no way

entitled, and ordinary words which have a direct reference to the character or quality of the goods, or are in their ordinary signification geographical names or surnames (*Uneeda Trade Mark* [1901] 1 Ch., 550; affd. on appeal). 'Invented words' are expressly authorized (s. 9 (3)); and an applicant's own name may, in certain circumstances, be sufficiently distinctive to be registered (*Teofani Co.* v. *Teofani* [1913] 2 Ch. 545). But letters of the alphabet, at any rate unless they are of a peculiarly distinctive character, cannot be registered as a trade mark (*Re Du Cros* [1913] A. C. 624).]

Renewal of registration and remedies

1670. The registration of a trade mark operates for a period of fourteen years, and may be renewed from time to time for a similar period before the expiration of the previous renewal.[a] During the continuance of any such period, the proprietor of a valid registered trade mark [b] has the exclusive right to the use, in the United Kingdom and the Isle of Man,[c] of such trade mark, upon or in connection with the goods in respect of which it is registered; and (*semble*) in the case of any infringement of his exclusive right by another person, may bring an action for damages or an account and an injunction, in the same way as for any other tort of the like nature.[d]

(a) Trade Marks Act, 1905, ss. 28, 30.

[When a trade mark has been allowed to lapse, it may be re-registered at any time within a year from its removal from the register; unless the Registrar is satisfied that there has been no *bonâ fide* user of it during the two years immediately preceding the removal (s. 31).]

(b) The validity of a trade mark may be disputed either (i) on the application to register (s. 14), or (ii) in an action for infringement, or (iii) on a special application for removal from the register (s. 35). But registration is *primâ facie*, and, after seven years

(except where it has been obtained by fraud or the mark is immoral or scandalous) conclusive evidence of validity (ss. 40, 41); and, where the validity of a registered trade mark has been unsuccessfully impeached in legal proceedings, the Court may grant a certificate of validity which, in subsequent proceedings alleging invalidity of that mark, will entitle the proprietor, if successful, to full costs as between solicitor and client (s. 46). No trade mark registered prior to 11th August, 1905, which would be registrable under the Act of 1905, can be removed on the ground that it was not properly registrable under the Acts in force at the date of its registration (s. 36).

(c) Trade Marks Act, 1905, s. 70.

(d) *Ibid.* s. 43. (But no damages or account will be awarded unless fraud on the part of the defendant is proved (*Slazenger* v. *Spalding* [1910] 1 Ch. 257).)

[The Act is singularly reticent on the subject of infringement; but, presumably, any breach of the rights conferred by the Act would be a tort, and, as such, would entitle the proprietor to the usual remedies for a tort.]

User of own name, etc.

1671. No registration under the Trade Marks Act, 1905, will interfere with any *bonâ fide* use by a person of his own name or place of business, or that of any of his predecessors in business, or the use by any person of any *bonâ fide* description of the character or quality of his goods.

Ibid. s. 44.

[For a similar point in connection with 'passing off' cases, see *post*, § 1675.]

Removal from register

1672. A trade mark may be removed from the register on the application of any person aggrieved, on the ground that it was not properly capable of registration, or on the ground that it was registered

by the proprietor or a predecessor in title without any *bonâ fide* intention to use it in connection with such goods, or that there has in fact been no such *bonâ fide* user within five years prior to the application.

Trade Marks Act, 1905, ss. 35, 37.

[In the latter case, the application may be defeated by showing that the non-user is due to special circumstances in the trade (*ibid.*).]

Transfer of trade mark

1673. A registered trade mark is assignable and transmissible only in connection with the goodwill (*post*, §§ 1676–1680) of the business concerned in the goods for which it has been registered; and it determines with such goodwill.[a] The assignee or other acquirer of the trade mark is entitled to be registered as proprietor, on proving his title to the satisfaction of the Registrar.[b]

(a) *Ibid.* s. 22.

[Upon a dissolution of partnership, or withdrawal from business, of a registered proprietor, the Registrar may, subject to an appeal to the Board of Trade, sanction the apportionment of his registered trade marks (s. 23).]

(b) *Ibid.* s. 33.

[No special form of assignment is, apparently, prescribed, either by the Act or the Rules. But no trust can be registered (s. 4).]

Unregistered trade marks

1674. No person may take any proceedings to prevent, or recover damages for, any infringement of an unregistered trade mark; other than a trade mark

in use before 13th August, 1875, which has been refused registration under the Trade Marks Act, 1905.

Trade Marks Act, 1905, s. 42.

[The date is, of course, that of the passing of the Trade Marks Act, 1875, which first gave statutory recognition to trade marks. The history of trade marks is one of the clearest examples of the way in which an equitable jurisdiction for the prevention of fraud gives rise to new forms of property. For the most part, the statutory provisions adopted the rules evolved by the Court of Chancery; but, obviously, not entirely, otherwise the old trade marks could have been registered under the statute. Leading cases are *Leather Cloth Co.* v. *American Leather Co.* (1865) H. L. C. 523; *Liebig's Extract of Meat Co.* v. *Hanbury* (1867) 17 L. T. 298; and *Raggett* v. *Findlater* (1873) L. R. 17 Eq. 29 ('nourishing stout'). But the subject is not of sufficient interest to warrant detailed treatment.]

'Passing off'

1675. Independently of the proprietorship of any trade mark, a person whose name, description, signs, labels, or goods is or are imitated so closely by a rival in business as to lead the public to believe that it is purchasing such person's goods, is entitled to take proceedings to stop such imitation, and for an account of profits or for damages.[a] It is not necessary for him to prove that the defendant's conduct was, in fact, fraudulent.[b] (*Semble*) the mere use of the defendant's own name cannot amount to a 'passing off.'[c]

(a) *Thompson* v. *Montgomery* [1891] A. C. 217.
Reddaway v. *Banham* [1896] A. C. 199.
Powell v. *Birmingham Vinegar Co.* [1896] 2 Ch. 54.

[The right to take such proceedings is expressly reserved by the Trade Marks Act, 1905, s. 45. Even the fact that a patent once

held by the plaintiff for the goods in question has been revoked, will not, necessarily, be fatal to a 'passing off' action (*Edge* v. *Niccolls* [1911] A. C. 693).]

(b) *Millington* v. *Fox* [1838] 3 Myl. & Cr. 338.
Saxlehner v. *Apollinaris Co.* [1897] 1 Ch. 893.
Bourne v. *Swan & Edgar, Ld.* [1903] 1 Ch. at p. 227, *per* Farwell, J.

[It would appear that, where the defendant has not been guilty of fraud, no account or damages will be awarded against him (*Edelsten* v. *Edelsten* (1863) 1 De G. T. & S., at p. 199, *per* Lord Westbury, C, followed by Lord Blackburn in *Singer Manfg. Co.* v. *Long* (1882) L. R. 8 App. Ca., at p. 31).]

(c) *Burgess* v. *Burgess* (1853) 3 De G. M. & J. 896.
Turton v. *Turton* (1889) 42 Ch. D. 128.
Brinsmead v. *Brinsmead* (1913) XXIX T. L. R. 706 (C. A.).

[There is a considerable difference on the last point between an individual and a corporate defendant. Inasmuch as a corporation's name is artificially acquired, it is much easier to persuade the Court that it has been adopted or used for unfair objects than in the case of a birth name (*Brinsmead* v. *Brinsmead* (*Limited*) (1896) XIII T. L. R. 3 (C. A.); *Kingston, Miller & Co.* v. *Kingston & Co.* [1912] 1 Ch. 575). But where a patent has expired, even if the patented article has been sold under a specific description (not containing the plaintiff's name), the plaintiff cannot prevent the sale of it by rivals under the same description (*Linoleum Co.* v. *Nairn* (1878) 7 Ch. D. 835). And an attempt to do so by registering the description as a trade mark will be defeated (*Re Ralph* (1883) 25 Ch. D., at p. 199, *per* Pearson, J.; *Magnolia Metal Co.* [1897] 2 Ch. 371; *Re Gestetner* [1908] 1 Ch. 513)].

Goodwill

1676. The goodwill of a business or undertaking is the benefit of the trade connection, and other incidental advantages, of such business or undertaking.[a] Goodwill may exist apart from any site or buildings.[b]

(a) *Potter* v. *Commissioners of Inland Revenue* (1854) 10 Exch. 147.
Churton v. *Douglas* (1859) Johns. 174.
Trego v. *Hunt* [1896] A. C. 7.

[It must, of course, be remembered, that the acquisition of goodwill does not of itself include the current rights and liabilities of the business.]

(b) This was for some time doubted, owing to a definition by Lord Eldon in *Cruttwell* v. *Lye* (1810) 17 Vesey, at p. 346. But, while it is obvious that the goodwill of certain businesses, e. g. a publican's, would have little value apart from the premises on which they were conducted, it is equally clear that the value of the goodwill of others, e. g. a newspaper or a professional practice, is largely independent of the precise buildings in which they may hitherto have been carried on. This fact is fully recognized by the cases quoted above.

['Goodwill' may be regarded as property at its vanishing point; for it is clear that the purchaser of 'goodwill' can neither (a) compel the customers of the former proprietor to continue to deal with him, nor (b) prevent strangers, or even (subject to §§ 1678, 1679) the vendor, competing with him for the business of such customers. Nevertheless, the importance of established custom and habit in business affairs is so great, that large sums of money are constantly paid for the mere chance of securing the consequences of them. The Court of Exchequer was, therefore, merely recognizing facts, when it definitely decided, in *Potter* v. *Inland Revenue*, *ubi sup.*, that goodwill was 'property'.]

Right of purchaser to use name of vendor

1677. The voluntary sale of the goodwill of a business entitles the purchaser to use the name or style of such business so long as it is carried on by him.

Levy v. *Walker* (1879) 10 Ch. D. 436.
Burchall v. *Wilde* [1900] 1 Ch. 551.
Townsend v. *Jarman* [1900] 2 Ch. 698.

[The purchaser must not, however, use the vendor's name in such a way as to expose the vendor to personal liability (*Thynne* v. *Shove* (1890) 45 Ch. D. 577).]

Soliciting customers of old business

1678. The voluntary vendor of the goodwill of a business will not be allowed to solicit the customers of such business, and will be restrained from doing any

acts which will enable him to do so.[a] But he cannot, in the absence of express agreement,[b] be restrained from carrying on a similar business on his own account;[c] and a bankrupt, the goodwill of whose business has been sold by his trustee without his concurrence, may both carry on a rival business and solicit his old customers.[d]

(a) *Trego* v. *Hunt* [1896] A. C. 7.
Gillingham v. *Beddow* [1900] 2 Ch. 242.
Curl v. *Webster* [1904] 1 Ch. 685.

[A person who enters into partnership on the terms that the goodwill of the business shall belong to the other partners, is in the same position as a vendor for this purpose (*Trego* v. *Hunt*, *ubi sup.*). *Curl* v. *Webster* shows that, even after the old customers have voluntarily returned, he must not solicit them.]

(b) And, of course, any such agreement will be 'in restraint of trade,' and, as such, only valid if it is reasonable (*ante*, Bk. I, § 96).
(c) *Churton* v. *Douglas* (1859) Johns. 174.
Johnson v. *Helleley* (1864) 2 De G. J. & S. 446.
(d) *Cruttwell* v. *Lye* (1810) 17 Ves. 335.
Walker v. *Mottram* (1881) 19 Ch. D. 355.
Jennings v. *Jennings* [1898] 1 Ch. 378.

Vendor using old name

1679. The voluntary vendor of the goodwill of a business will also be prevented from using the name or style of such business in any competing business carried on by him; even when such name or style is, or comprises, his own individual name.

Churton v. *Douglas*, *ubi sup.*
Pomeroy v. *Scalé* (1907) XXIII T. L. R. 170.

Value of goodwill

1680. In the dissolution of a partnership by the Court, the value of the goodwill of the business will always be taken into account.

Hill v. *Fearis* [1905] 1 Ch. 466.

TITLE VII.—COPYRIGHT

Literary copyright

1681. Copyright in a literary work means, for the purposes of this Title, the sole right (i) to multiply and publish copies, whether written or printed, and whether in the original tongue or a translation, of the whole or any substantial part of any book, pamphlet, handbill, map, chart, plan, table, compilation, or other document intended by the author to convey its meaning wholly or mainly by the use of words or abbreviations of or symbols for words, whether accompanied by drawing or colouring, or not, and having an original character, (ii) to make any record or other contrivance by means of which the work may be mechanically performed or delivered, (iii) in the case of a lecture, address, speech, or sermon, also to deliver it, either orally or by means of any mechanical instrument, in public, (iv) to convert the work into a dramatic work by way of performance in public, or otherwise, and (v) to authorize any of the above acts.

Copyright Act, 1911, ss. 1 (2), 35 (1).

[This and the following three §§ are an attempt to separate and distinguish between several species or forms of copyright, which, to the confusion of the reader, are mixed up, in an ambitious effort towards brevity, in s. 1 (2) of the Copyright Act, 1911.]

1682. Copyright in a dramatic work means, for the purposes aforesaid, the sole right (i) to perform, or authorize the performance of, the whole or any substantial part of any dramatic work, including a play, recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and also any cinematograph production where the arrangement or acting form or the combination of incidents represented gives the work an original character, (ii) to convert it, or authorize it to be converted, into a novel, or other non-dramatic work, and (iii) to make or publish, or authorize to be made or published, copies of such dramatic work. *Dramatic copyright*

Ibid.

1683. Copyright in musical work means, for the purposes aforesaid, the sole right (i) to perform, and to authorize the performance of, in public, the whole or any substantial part of a musical work, (ii) to multiply and publish, and to authorize the multiplication and publication of, copies of the score, and (iii) to make, or authorize the making of, any record, perforated roll, or other contrivance by means of which such work may be mechanically performed or delivered. *Musical copyright*

Ibid.

[*Semble:* there is no definition of 'musical work' in the Act of 1911; but there is an attempted definition in section 3 of the Musical (Summary Proceedings) Copyright Act, 1902, which is not repealed by the Act of 1911.]

Artistic copyright

1684. Copyright in artistic work means, for the purposes aforesaid, the sole right to reproduce and multiply, and to authorize the reproduction and multiplication of, copies of the whole or any substantial part of any work of painting, drawing, sculpture, or artistic craftsmanship, or of any architectural work of art, engraving or photograph. But, as regards an architectural work of art, copyright does not extend to processes or methods of construction.

Copyright Act, 1911, ss. 1 (2), 35 (1).

Duration of copyright

1685. Copyright exists during the life of the author of a work and fifty years after his death; whether the work has or has not been published in his lifetime.

Ibid. ss. 3, 31.

But: —

(i) in the case of a work of joint authorship, the copyright lasts during the life of the joint author who dies first, and fifty years afterwards, *or* during the life of the joint author who dies last, whichever period is the longer;

Ibid. s. 16 (1).

(ii) in the case of a literary, dramatic, or musical work, or an engraving, wherein copyright existed at the death of its author (or, in the case of joint authorship,

at or immediately before the death of the author who died last), but which has not been published or performed in public (or, in the case of a lecture, delivered in public) before such death, the copyright will last until publication, or performance or delivery in public, and for fifty years afterwards;

Ibid. s. 17 (1).

[Ownership of the MS. of an unpublished, unperformed, or undelivered work, acquired by testamentary disposition of the author, is *primâ facie* evidence of ownership of the copyright (*ibid.* (2)).]

(iii) in the case of photographs, and of contrivances by which sounds may be mechanically reproduced, copyright will last for fifty years from the making of the original negative or plate from which the photograph or contrivance was directly or indirectly derived;

Ibid. ss. 19 (1), 21.

[In other respects, perforated rolls, &c. rank as 'musical works,' and enjoy the protection of copyright (*ibid.*).]

(iv) in the case of works in which copyright existed on the 30th June, 1912, the existing copyright is converted into the copyright described in this Title, except that, where the owner was not at such date entitled (in the case of musical or dramatic works) to performing right, he

does not obtain the sole right to perform the work or any part thereof in public; and that where the owner of the performing right was not, at such date, entitled to the copyright, he continues to keep the sole right of public performance for the extended period, but does not get the other advantages of copyright.

Copyright Act, 1911, s. 24 and Sched. I.

Title to copyright

1686. The copyright in any work belongs, in the first instance, to the author or his representatives.[a] The owner of copyright may assign it, wholly or partially, by written assignment, signed by himself or his duly authorized agent.[b] But, when the author of a work is the first owner of the copyright therein,[c] no assignment by him (other than an assignment by testament) will be operative to vest in the assignee any rights beyond the expiration of twenty-five years from the author's death; and the reversionary interest expectant on the termination of that period will, notwithstanding any agreement to the contrary, but subject to § 1687, devolve on (the author or[d]) his personal representatives as part of his estate.[e]

(a) *Ibid.* s. 5 (1).

(b) *Ibid.* s. 5 (2). Assignment in writing clearly includes a testamentary disposition.

(c) It is rather difficult to see how, under the Act, any one but the author could be the first owner of the copyright; except where the work is made in the course of the author's employment under a contract of service or apprenticeship (s. 5 (1) (*b*)).

(d) Presumably, the reversionary interest actually belongs to the author; though any assignment of it by him (other than testamentary) would be ineffectual.
(e) Copyright Act, 1911, s. 5 (2).

Existing copyright

1687. Where a copyright was in existence immediately before the 1st July 1912, but was not vested in the author of the work, the owner does not, under the Copyright Act, 1911, acquire any extension of the copyright; but, at the date when, but for the passing of the Copyright Act, 1911, it would have expired, the copyright will pass to the author or his personal representatives for the residue of the period described in § 1685 (iv) *ante*. But the owner of the copyright on the 1st July, 1912 (or his successors in title) has, on giving the prescribed notice, the right of pre-emption for such extended period, or the right of production during such extended period, on terms to be settled by agreement or arbitration, and the right to be compensated for any unexhausted expenditure or liability incurred, before 26th July, 1910, in connection with the reproduction or performance of such work in a manner which at the time was lawful, or with a view to its reproduction or performance at a time when such reproduction or performance would, but for the passing of the Copyright Act, 1911, have been lawful. *Ibid.* s. 24.

Work done to order

1688. Where in the case of an engraving, photograph, or portrait, the plate or other original was

ordered by some person other than the author, and made for valuable consideration in pursuance of such order, the person giving such order will (in the absence of agreement) be the first owner of the copyright; and, in any other case, where the work was made by the author in the course of his employment as a servant or apprentice, the employer will (in the absence of agreement) be the first owner of the copyright.

Copyright Act, 1911, s. 5 (1) (a) and (b).

[The section seems to assume that an article or other contribution contributed to a 'newspaper, magazine, or similar periodical' will not become the copyright of the proprietor of the periodical, unless the contributor was servant or apprentice; for it gives the contributor a right to prohibit its reproduction in separate form. If this is a correct view, the Act has substantially altered the law as laid down in *Lawrence* v. *Aflalo* [1904] A. C. 17, which was, however, a case of an encyclopædia, not of a periodical. There is no definition of an 'author' in the statute; but the translator of a work is the 'author' of the translation (*Byrne* v. *Statist Co.* [1914] 1 K. B. 622).]

Infringement of copyright

1689. An infringement of copyright is committed by any person who, without the consent of the owner of the copyright:—

(i) does any act which such owner has, by virtue of the Copyright Act, 1911, sole right to do (§§ 1681–4 *ante*); *or*,

(ii) does any of the following acts, viz.:—

(a) sells or lets for hire, or by way of trade exposes or offers for sale or hire,

(b) distributes, either for purposes of trade

or to such an extent as to affect prejudicially the owner of the copyright,

(c) by way of trade exhibits in public,

(d) imports for sale or hire into any part of His Majesty's Dominions to which the Copyright Act, 1911, extends,

any work which, to his knowledge, infringes copyright, or would infringe copyright if it had been made within the part of His Majesty's Dominions in or into which such act took place; *or*

(iii) for his private profit, permits a place of entertainment to be used for the public performance of any copyright work, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

Copyright Act, 1911, s. 2.

Acts not infringements

1690. The following acts are not infringements of copyright, viz.:—

(i) fair dealing with any work, for purposes of private study, research, criticism, review, or newspaper summary;

(ii) the use, by the author of an artistic work, who is not the owner of the copyright, of any mould, cast, sketch, plan, model, or

study made by him for the purpose of the work, without thereby repeating or imitating the main design of the work;

(iii) the making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, permanently situate in a public place or building, or (provided that they are not in the nature of architectural drawings or plans) of any architectural work of art;

(iv) the publication in a collection (mainly composed of non-copyright matter), *bonâ fide* intended for the use of schools and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools; but not more than two passages may be published from one author by the same publisher in five years, and the source of all passages quoted must be acknowledged;

(v) the publication, in a newspaper, of a report of a public lecture, report of which is not prohibited by express conspicuous written or printed notice;

(vi) the reading or recitation in public by one

person of any reasonable extract from any published work;

Copyright Act, 1911, s. 2 (1).

(vii) the publication of a newspaper report of an address of a political nature delivered at a public meeting;

Ibid. s. 20.

(viii) in the case of a musical work, the making (after due notice and on payment of the statutory royalties) of records, perforated rolls, or other contrivances by means of which the work may be mechanically performed, where similar contrivances have been previously made by, or with the consent or acquiescence of, the owner of the copyright in the work.

Ibid. s. 19 (2).

[There are special and somewhat complicated provisions in the section on the subject of musical works or mechanical records published or made before the commencement of the recent Act (s. 19 (7) (8)).]

Reproduction of old works

1691. Copyright is not deemed to be infringed by the reproduction of a copyright work twenty-five years (or, in the case of a work in which copyright existed on the 16th December, 1911, thirty years) after the death of the author; if the person reproducing the work proves that he has given the prescribed notice in writing of his intention so to do,

and that he has paid in the prescribed manner to, or for the benefit of, the owner of the copyright, royalties in respect of all copies of the work sold by him, at the rate of ten *per cent.* on the published price.

Copyright Act, 1911, s. 3.

[The form of notice and the method of paying royalties may be prescribed by the Board of Trade (*ibid.*).]

Compulsory licenses

1692. Where, at any time after the death of the author of a literary, dramatic, or musical work, which has been published or performed in public, it appears, on complaint to the Judicial Committee of the Privy Council, that the owner of the copyright has refused to allow republication or performance in public, and that, by reason of such refusal, the work is withheld from the public, the owner of the copyright may be ordered to grant a license to reproduce it or perform the work in public, on such terms, and subject to such conditions, as the Judicial Committee may think fit.

Ibid. s. 4.

[It will be observed that there is no power to compel the production of an unpublished work.]

Scope of copyright

1693. Copyright arises in respect of works published in any part of His Majesty's Dominions to which the Act extends, whether by British subjects or not, and (in the case of an unpublished work) in

respect of works of British subjects, wherever resident, and, in the case of other persons, if resident in any part of such dominions to which the Act extends,[a] and will be protected against all infringements within such dominions.[b] But it will not be protected in respect of infringements in any of the self-governing dominions of the Crown,[c] unless the provisions of the Copyright Act, 1911, are declared by the legislature of such dominion to be in force therein.[d]

(a) But protection may be refused to the works, published within the British Empire, of authors who are subjects of a foreign country which does not give, or undertake to give, adequate protection to the works of British authors (Copyright Act, 1911, s. 23).

[For the purposes of the provisions of the Act as to residence, an author is deemed to be resident in any part of the British Dominions to which the Act extends, if he is domiciled therein (s. 35 (5).]

(b) *Ibid.* s. 1 (1).

(c) These are, the Dominions of Canada and New Zealand, the Commonwealth of Australia, the Union of South Africa, and the Colony of Newfoundland (s. 35).

(d) *Ibid.* s. 25 (1). (The adoption of the Act by a dominion may be certified by a Secretary of State by notice in the *London Gazette* (*ibid.* (2)). Reciprocal protection may be given by Order in Council where the dominion, though not adopting the Act, affords adequate protection for the works of authors resident in the British Empire outside the dominion in question (s. 26 (3)).)

[Arrangements may also be made by Order in Council for giving whole or partial effect to the provisions of the Copyright Act, 1911, in respect of works published in a foreign country, or made by residents in a foreign country; but only after the making of a convention by which reciprocal rights are secured in such country for the proprietors of British copyright (ss. 29, 30). The latter rights are, obviously, not created or enforced by English law; and the details of the former must be sought in the Orders in Council affecting such countries respectively. Such countries are said to be within the Copyright Union, and have accepted, with more or less reservation, the resolutions of the Berne Convention of 1886 and

the Berlin Convention of 1906. They include most of the civilized States of the world, but not the United States of America, nor the Chinese Republic. The benefits of the Act may also be extended, by Order in Council, to British Protectorates, and to Cyprus (s. 28). Under these provisions, Orders in Council, dated 24th June, 1912 (two) have applied the provisions of the Act of 1911 to the countries within the Union and to British Protectorates and Cyprus. The older Orders are still in force in the dominions to which the Act of 1911 does not apply.]

Remedies for infringement

1694. The owner of a copyright or any interest therein, whose rights have been infringed, has the ordinary civil remedies by way of an action for damages, or account of profits, and an injunction against the infringer.

Copyright Act, 1911, s. 6 (1).

[Costs of all proceedings are in the absolute discretion of the Court. *Ibid.* (2).]

But: —

(i) where the defendant proves in such action that he was not aware of, and had no reasonable ground to suspect, the existence of the copyright, the plaintiff will not be entitled to any remedy other than an injunction;

Ibid. s. 8.

(ii) where the construction of a building or other structure which infringes, or would, if completed, infringe, copyright, has been commenced, no injunction restraining its

completion, or ordering its demolition, will be granted;

Ibid. s. 9.

[Obviously, if the infringer, in such a case, proves that he was an innocent offender, no remedy at all lies against him.]

(iii) an action in respect of infringement of copyright must be commenced within three years next after the infringement.

Ibid. s. 10.

Forfeiture of pirated copies

1695. Subject to § 1694 (i) and (ii), all infringing copies of any work in which copyright exists, and all plates used or intended to be used in or for the production thereof, are deemed to be the property of the owner of the copyright, who may take proceedings for recovery of possession thereof, or in respect of the conversion thereof.

Ibid. s. 7.

[It seems very doubtful on the Act whether this provision applies to an innocent infringer (s. 8); and it does not apply to buildings or other structures which constitute infringements of copyright (s. 9 (2)). For some kinds of infringement of copyright, the infringer is liable to criminal prosecution, resulting in fine or, in case of repetition, imprisonment (ss. 11–13).]

Prohibition of importation

1696. In addition to his other remedies, the owner of copyright may, on taking the proper steps, and complying with the Regulations on the subject, cause the importation into the United Kingdom

(which, for this purpose, does not include the Isle of Man) of infringing copies of his work, to be prohibited.

Copyright Act, 1911, s. 14.

Abolition of 'common law right'

1697. No rights in the nature of copyright, other than those conferred or recognized by the Copyright Act, 1911, can be claimed in any literary, dramatic, musical, or artistic work.

Ibid. s. 31.

[Thus the old so-called 'common law right' in unpublished material is abolished; copyright now running from production, or 'making,' not from publication. But the remedies conferred by the recent Musical Copyright Acts of 1902 and 1906 are expressly reserved by the Act of 1911.]

SECTION XIV

ALIENATION OF CHOSES IN ACTION

TITLE I—VOLUNTARY ALIENATION

Legal assignment

1698. Subject to the exceptions and provisions contained in Section XIII, any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only [a]) of any debt or other legal chose in action, of which express notice in writing [b] shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, will be, and be deemed to have been, effectual in law (subject to § 1699) to pass or transfer the legal right to such debt or chose in action from the date of such notice,[c] and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.[d]

(a) This clause does not exclude an assignment by way of mortgage in the ordinary form, i. e. absolute assignment with a proviso for redemption (*Durham Bros.* v. *Robertson* [1898] 1 Q. B. 765; *Bateman* v. *Hunt* [1904] 2 K. B. 530), nor an assignment upon trust (*Comfort* v. *Betts* [1891] 1 Q. B. 737). But it does exclude, even though the word 'assign' is used, a mere charge or security (*Mercantile Bank of London* v. *Evans* [1899] 2 Q. B. 613), and, *semble*, though the point is still formally open, an assignment even of a definite part of an ascertained debt (*Forster* v. *Baker* [1910] 2 K. B. 636).

(b) The notice, though it must be express, need not be formal. Any document which indicates to the person liable the existence of the assignment, is sufficient (*Denney* v. *Conklin* [1913] 3 K. B. 177).

(c) And, therefore, in the absence of fraud, or knowledge by a later assignee of an earlier assignment, successive assignments will rank, not in order of date, but in order of notice to the debtor (*English, Scottish, &c. Insurance Co.* v. *Brunton* [1892] 2 Q. B. 700).

(d) Judicature Act, 1873, s. 25 (6).

[The scope of this well-known enactment is extremely difficult to ascertain; and two obvious questions encounter the interpreter, viz. (i) what rights are choses in action within the meaning of the sub-section?, and (ii) which of these are 'legal'? Regard being had to the wording of the s.-s. itself, it can hardly be assumed to include interests such as patents, trade marks, goodwill, or even stocks and shares, as to which there is no 'debtor, trustee, or other person' liable, to whom notice of assignment can be given (*Torkington* v. *Magee* [1902] 2 K. B., at p. 430, *per* Channell, J.). But there would seem to be no *primâ facie* difficulty in including all other forms of incorporeal personal property. Again, what is a 'legal' chose in action? Properly speaking, in 1873, it should have meant only rights capable of being enforced in a Common Law Court, i. e. practically, only claims for debts or damages; and, as the Judicature Act dealt primarily with procedure, it might well be supposed that this was the meaning of the word 'legal' in this connection. But the use of the word 'trustee' in the s-s. seems to indicate that ordinary claims by a beneficiary against his trustee are intended to fall within its scope; though these were clearly not enforceable at law in 1873. Apparently, by a sort of prolepsis, the framers of the Act regarded the intended fusion of jurisdictions as already accomplished, and used the word 'legal' in the sense of 'enforceable in a court of justice.' At any rate, the Judicial Committee has declined to express any dissent from the view laid down in a Colonial Court, to the effect that the phrase includes 'all rights the assignment of which a Court of Law or Equity would before the Act have considered lawful' (*King* v. *Victoria Insurance Co.* [1896] A. C., at p. 256); and it is quite certain that many claims enforceable only in equity were by Courts of Equity treated as assignable. On the other hand, it is equally clear that the s-s. did not intend to make rights assignable which were not, prior to the Act, regarded as voluntarily transferable either at law or in equity, e. g. claims to unliquidated damages in tort (*ante*, Bk. II, Pt. III, Sect. I, Tit. VI,

§ 788). It seems, then, the safest conclusion to draw, that all that the s-s. has done is to allow an assignee, when its provisions have been complied with, to sue in his own name in any court, instead of requiring him to resort to a Court of Equity to compel the assignor to lend the use of his name. Thus, for example, the assignee of the benefit of a claim under an insurance policy, even though the assignment is only by way of mortgage, can now sue the insurance company in his own name (*Swan's and Cleland's Graving Dock* v. *Maritime Insurance Co.* [1907] 1 K. B. 116).]

Subject to equities

1699. Such assignment will be subject to all claims, whether legal or only equitable, which, at the time when he received notice of the assignment, the debtor, trustee, or other person liable would have been entitled to raise by way of defence or set-off, against the assignor seeking to enforce the chose in action.

Judicature Act, 1873, s. 25 (6).
Newfoundland v. *Newfoundland Ry. Co.* (1888) L. R. 13 App. Ca. 199.
Stoddart v. *Union Trust, Ld.* [1912] 1 K. B. 181.

[In the last case, the party liable sought in vain to set up, against the assignee, a plea of fraud which, the contract having been confirmed, could not be used as a defence to the action on the contract, but only as an independent claim in tort against the assignor.]

Interpleader by party liable

1700. If the debtor, trustee, or other person liable in respect of such debt or chose in action has received notice that any such assignment is disputed by the assignor or any person claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he may call upon the rival claimants

to interplead, or pay the sum due from him into Court under the Trustee Act, 1893.

Judicature Act, 1873, s. 25 (6).
Trustee Act, 1893, s. 42.

Assignment of future debts

1701. Future debts arising out of an existing contract may be validly assigned at law under the provisions of § 1698 as against the debtor;[a] but an assignment of future debts which will not arise until conditions involving the carrying on of the assignor's business have been fulfilled, will not be valid against the trustee in bankruptcy of the assignor, if the conditions have not been fulfilled before the commencement of the bankruptcy.[b]

(a) *Brice* v. *Bannister* (1878) 3 Q. B. D. 569.
Walker v. *Bradford Old Bank* (1884) 12 Q. B. D. 511.
Jones v. *Humphreys* [1902] 1 K. B., at p. 13, *per* Alverstone, C. J.
Skipper v. *Holloway*, [1910] 2 K. B., at p. 634, *per* Darling, J.
(b) *Ex parte Nichols* (1883) 22 Ch. D. 782.
In re Davis (1888) 22 Q. B. D., at p. 199.
Wilmot v. *Alton* [1897] 1 Q. B. 17.

[There is not much authority for saying that debts to arise in the future out of an existing contract, as distinguished from debts due but not yet payable, can be legally assigned; even apart from the question of bankruptcy. But *Walker* v. *Bradford Old Bank* seems to justify the view.]

Equitable assignment

1702. A valid equitable assignment of any chose in action can be made by word of mouth or writing not in accordance with the provisions of § 1698;[a] except that no assignment of any trust can be made

otherwise than by writing signed by the assignor, or by his testament.[b] But no merely equitable assignment of a legal chose in action will entitle the assignee to sue the person liable without joining the assignor;[c] and an equitable assignment of a future chose in action, not arising out of an existing contract, even though made by deed, requires a valuable consideration.[d]

(a) *Ex parte South* (1818) 3 Swanst. 392.
Diplock v. *Hammond* (1854) 5 De G. M. & G. 320.
Brandts v. *Dunlop* [1905] A. C. 454.

[Of course, no assignment will bind the party liable until he has notice of it; and the assignee takes subject to all equities between the assignor and the party liable (*Torkington* v. *Magee* [1903] 1 K. B. 644).]

(b) Statute of Frauds (1677) s. 9.
Wills Act, 1837, s. 3.
(c) *Torkington* v. *Magee* [1902] 2 K. B., at p. 432, *per* Channell, J.
Glegg v. *Bromley* [1912] 3 K. B., at p. 489, *per* Parker, J.

[The objection of want of parties cannot be insisted on if it is clear that the assignor has no interest in the proceedings (*Brandts* v. *Dunlop*, *ubi sup.*, at p. 462).]

(d) *Meek* v. *Kettlewell* (1843) 1 Ph. 342.
Tailby v. *Official Receiver* (1888) L. R. 13 App. Ca. 523.
Re Ellenborough [1903] 1 Ch. 697.
Glegg v. *Bromley* [1912] 3 K. B. 474.

[No consideration is required for the validity of an assignment of existing choses in action (*Kekewich* v. *Manning* (1851) 1 De G. M. & G. 176; *Re Patrick* [1891] 1 Ch. 82, C. A.; *Re Fitzgerald* [1904] 1 Ch. at p. 591, *per* Cozens, Hardy, L. J.); and, even in the case of assignments of future debts, if they arise out of an existing contract, the debtor will (*semble*) not be allowed to raise any objection, founded on want of valuable consideration, to the validity of the assignment (*Walker* v. *Bradford Old Bank* (1884) 12 Q. B. D. 511). *Tailby* v. *Official Receiver* is important also as overruling the doctrine laid down in *Belding* v. *Read* (1865) 3 H. & C. 955,

and *Re D'Epineuil* (1882) 20 Ch. D. 758, to the effect that an assignment, for valuable consideration, of future choses in action not limited to any particular source, is not enforceable, even in Equity.]

Notice in case of future choses in action

1703. In the case of an assignment of future choses in action, consisting of claims upon a fund, the claims of rival assignees rank in the order in which notices of their assignments have been received by the trustee or holder of the fund after he has obtained effective control of the fund out of which payment is to be made.

Johnstone v. *Cox* (1881) 19 Ch. D. 17.
Re Dallas [1904] 2 Ch. 385.

Bills of Sale Acts not applicable

1704. Choses in action (including debentures [a] and future interests in chattels corporeal [b]) are not within the provisions of the Bills of Sale Acts, 1878 and 1882 [c].

(a) Bills of Sale Act, 1882, s. 17.
(b) *Re Tritton* (1889) 61 L. T. 301.
Re Thynne [1911] 1 Ch. 282.
(c) Bills of Sale Act, 1878, s. 4.

TITLE II—INVOLUNTARY ALIENATION

Bankruptcy

1705. Upon an adjudication in bankruptcy there passes to the trustee in bankruptcy[a] the ownership of all the choses in action belonging beneficially to the bankrupt at the commencement of the bankruptcy,[b] including debts due and growing due to the bankrupt in the course of his trade or business, as to which any assignee thereof has not taken steps to remove them from the order and disposition of the bankrupt.[c] Choses in action acquired by the bankrupt, after his adjudication but before his discharge, will also pass to his trustee in bankruptcy; subject to the provisions of Bk. I, § 70, *ante*.[d]

(a) Bankruptcy Act, 1883, s. 54.

[The property passes from trustee to trustee on appointment, without formal transfer (*ibid.*).]

(b) For the meaning of this expression, see *ante*, Sect. V, § 1453 (d).
(c) Bankruptcy Act, 1883, s. 44 (iii).
Rutter v. *Everett* [1895] 2 Ch. 872.
(d) Bankruptcy Act, 1883, s. 44 (iii).

Disclaimer by trustee

1706. The trustee in bankruptcy may, subject to the conditions specified in Sect. V, §§ 1454–1456, *ante*, disclaim any shares or stock in companies, or unprofitable contracts, or any other choses in action of the bankrupt, which are unsaleable by reason of their

binding the 'possessor' thereof to the performance of any onerous act or to the payment of any sum of money.[a] And the Court may, on the application of any one who is, as against the trustee, entitled to the benefit, or subject to the burden, of a contract made with the bankrupt, rescind such contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable.[b]

(a) Bankruptcy Act, 1883, s. 55 (1).
(b) *Ibid.* s. 55 (5).

Garnishment of debts

1707. A judgment creditor may (subject to § 1637, *ante*), obtain an order for attachment and payment to himself of any debt owing or accruing due to his judgment debtor, by means of garnishee proceedings against the person owing such debt ('garnishee').[a] Service of a garnishee order or notice thereof will bind the debt in the hands of the garnishee,[b] but will not be binding on the trustee in bankruptcy of the judgment debtor, unless the attachment is completed by receipt of the debt by the judgment creditor before the commencement of the bankruptcy.[c]

(a) O. XLV. r. 1. (O. XXVI. r. 1 of C. C. Rules.)

[The judgment must be still 'unsatisfied,' i. e. the judgment debtor must be actually in arrears under it (*White* v. *Stenning* [1911] 2 K. B. 418).]

(b) O. XLV. r. 2.
(c) Bankruptcy Act, 1883, s. 45 (1) (2).

[The effect of payment into Court 'to abide further order' is not to 'complete' the attachment (*Butler* v. *Wearing* (1885) 17 Q. B. D. 182).]

Debts capable of being garnished

1708. For the purposes of § 1707, 'debt' includes (i) a sum of money in the hands of a receiver in an administration action, payable to the judgment debtor,[a] (ii) the proceeds of an execution levied by the sheriff at the suit of the judgment debtor,[b] (iii) an annuity or other sum of money in the hands of trustees, payable to the judgment debtor,[c] and (iv) money arising from the property of a married woman restrained from anticipation (*ante*, Bk. I, §§ 105-108), provided that it was payable to her before the date of the garnishor's judgment.[d]

(a) *Re Cowan's Estate* (1880) 14 Ch. D. 63, as modified by *Webb* v. *Stenton* (1883) 11 Q. B. D. 518.
(b) *Re Greer* [1895] 2 Ch. 217.
(c) *Webb* v. *Stenton*, *ubi sup.*
(d) *Hood Barrs* v. *Heriot* [1896] A. C. 174.

Execution against securities

1709. Bank notes, cheques, bills of exchange, promissory notes, bonds, specialties, and other securities for money belonging to a judgment debtor, may be seized under a writ of Fieri Facias or County Court execution, and enforced for the benefit of the judgment creditor.

Judgments Act, 1838, s. 12.
County Courts Act, 1888, s. 147.

[In the High Court action, the sheriff sues on the securities, and hands the proceeds to the creditor (Judgments Act, 1838, s. 12). In the County Court action, the creditor sues in the name of the debtor (County Courts Act, 1888, s. 148).]

Charging order

1710. A charging order in favour of any creditor who has obtained judgment in the High Court may be made against any interest, legal or equitable, of the judgment debtor in any Government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not,)[a] including stocks, funds, annuities, or shares in Court.[b] Such order will have the same effect as if a charge in the creditor's favour had been given on such stocks, funds, annuities, or shares, by the judgment debtor; but it cannot be enforced until six months from the date of the order.[c]

(a) Judgments Act, 1838, ss. 14, 15.
(b) Judgments Act, 1840.
(c) Judgments Act, 1838, s. 14.

[Meanwhile, the charging order may be protected by a 'stop order' (in the case of a fund in Court), or by notice to the company or other body concerned (O. XLVI, rr. 4–13), which takes the place of the old writ of Distringas (*ibid.* r. 2; *ante*, § 1618, n.). A separate judgment creditor of a partner can obtain a charging order against his debtor's interest in the partnership, under s. 23 of the Partnership Act, 1890.]

Appointment of receiver

1711. In any case in which choses in action which belong to a judgment debtor, and are available for payment of his debts,[a] cannot be reached by any of

the other methods specified in this Title,[b] the Court may, in the exercise of its discretion, appoint a receiver of the debtor's interest, present or future,[c] with a view to its realization for the benefit of the creditor.[d]

(a) *Holmes* v. *Millage* [1893] 1 Q. B. 551 (future salary).
Cadogan v. *Lyric Theatre* [1894] 3 Ch. 338 (future profits of theatre).
Edwards v. *Picard* [1909] 2 K. B. 903 (future earnings of patent).

[In these cases the Court held that there was no available chose in action. The object of the procedure is merely to overcome technical difficulties, not to enlarge the scope of liability; though in fact it does the latter, in the cases to which it applies. But, (*semble*), since *Tailby* v. *Official Receiver* (1888) L. R. 13 App. Ca. 523, there can be no doubt that a voluntary alienation of the future rights discussed in the above cases would be valid.]

(b) *Goldschmidt* v. *Oberrheinische Metallwerke* [1906] 1 K. B. 373.
(c) *Tyrrell* v. *Painton* [1895] 1 Q. B. 202.
Holland v. *Ideal Bedding Co.* [1907] 2 Ch. 157.
(d) *Re Shephard* (1889) 43 Ch. D. at p. 135, *per* Cotton, L. J.

[The appointment of a receiver does not create any charge on the chose in action (*Ridout* v. *Fowler* [1904] 2 Ch. 93), or give the creditor a right to an order for sale (*Flegg* v. *Prentis* [1892] 2 Ch. 428), or any priority over earlier equitable claimants to the fund (*Arden* v. *Arden* (1885) 29 Ch. D. 709). But it does give the creditor priority over subsequent equitable claims (*Re Marquis of Anglesey* [1903] 2 Ch. 727).]

SECTION XV

INEFFECTUAL ALIENATIONS OF PROPERTY

TITLE I—UNDER THE ACT OF 1571 (13 ELIZ. c. 5)

Fraudulent conveyance

1712. Any disposition *inter vivos* [a] of property, real or personal, corporeal or incorporeal,[b] made to the intent to delay, hinder, or defraud creditors [c] and others of their just and lawful claims, will be void as against such creditors and others;[d] except that it cannot be set aside at the expense of any person who has, *bonâ fide* and for valuable consideration,[e] acquired an interest in such property under such disposition,[f] without any manner of notice of the intended fraud.[g]

(a) The Act (s. 1) expressly enumerates 'feoffment, gift, grant, alienation, bargain, conveyance, . . . by writing or otherwise, and all and every bond, suit, judgment, and execution.' It is believed, however, that there is no instance of a disclaimer having been held fraudulent under the statute; though a disclaimer might very well be made with direct intent to defeat creditors. (Of course a testamentary disposition cannot be a fraudulent disposition in the sense of the statute; because it can only operate after the testator's creditors have been satisfied.)

(b) There was at one time a doctrine that a chose in action, which, at the common law, could not be taken in execution, was not within the statute. But the doctrine is now clearly obsolete (*Stokoe* v. *Cowan* (1861) 29 Beav. 637; *Edmunds* v. *Edmunds* [1904] P. 362). For a similar reason, copyholds were at one time outside the scope of the statute (*Mathews* v. *Feaver* (1786) 1 Cox, 278). But the reason clearly disappeared with the passing of the Judgments Act, 1838, which (s. 11) expressly made copyholds liable to execution.

(c) There need not be more than one creditor defrauded (*Edmunds* v. *Edmunds* [1904] P. 362).

(d) It is generally assumed that the expression 'creditors and others' (which does not appear in the enacting clause, but is borrowed by reference from the preamble of the statute), though wide enough to include subsequent as well as existing creditors of all kinds, does not include purchasers. This construction is probably due to the wording of the preamble and enacting clause, which seems inapplicable to purchasers. Purchasers of lands can, of course, rely on the 27 Eliz. (1584) c. 4, as modified by the Voluntary Conveyances Act, 1893 (*ante*, Sect. IV, Tit. I, § 1397). And purchasers of chattels corporeal are greatly protected by the Bills of Sale Acts (*ante*, Sect. X, Tit. I, §§ 1559–60; Tit. II, §§ 1573–79), and the doctrine of 'market overt' (*ante*, Sect. X, Tit. I, § 1568). But there seems to be no statutory protection for *bonâ fide* purchasers of choses in action who find themselves defrauded by a previous assignment.

(e) The Act says 'good' consideration; but, from very early days, judicial interpretation has glossed it as 'valuable' (*Twyne's Case* (1601) 3 Rep., at 81 b). Moreover, an existing debt is not of itself valuable consideration for the purpose; though forbearance to sue for such debt may well be (*Glegg* v. *Bromley* [1912] 3 K. B. 474).

(f) 13 Eliz. (1571) c. 5, s. 5. The purchaser need not take directly by the fraudulent conveyance; and the interest that he acquires need not be clothed with the legal estate or ownership (*Halifax Joint Stock Banking Co.* v. *Gledhill* [1891] 1 Ch. 31).

(g) 13 Eliz. (1571) c. 5, ss. 1, 5.

[It seems extraordinary that there should be no official short title for this important statute.]

'Badges of fraud'

1713. Any of the following circumstances occurring in connection with a disposition of property *inter vivos* will, unless satisfactorily explained, raise a presumption that such disposition was made with intent to delay, hinder, or defraud creditors, viz.: —

(i) that the disposition was of all, or substantially all, the disposer's property;

(ii) that the disposer continued in possession

or control of the property after the disposition;

[This presumption may, of course, be rebutted by showing that the disposition was intended as a *bonâ fide* mortgage or other security (*Stone* v. *Grubham* (1614) 2 Bulstr., at p. 226, *per* Coke, C. J.; *Edwards* v. *Harben* (1788) 2 T. R., at p. 595, *per* Buller, J.).]

(iii) that the disposition was made secretly;

(iv) that the disposition was made while the person seeking to impeach the disposition (? any creditor) was attempting to enforce his claim by legal proceedings;

(v) that there was a trust between the parties for the benefit of the disposer;

(vi) that the disposition, if in writing, contains unusual clauses.

Twyne's Case (1601) 3 Rep. 81 a.

Voluntary settlements

1714. A voluntary disposition of property *inter vivos* will be deemed fraudulent for the purposes of § 1712, if when it was made the disposer was either:—

(i) insolvent without the aid of the property comprised in the disposition; *or*

Freeman v. *Pope* (1870) L. R. 5 Ch. App., at p. 545, *per* Giffard, L. J. *Re Lane Fox* [1900] 2 Q. B., at p. 513, *per* Wright, J.

(ii) about to enter upon a hazardous business in which he was likely to incur debts which he could not pay without recourse to the property included in the disposition.

Stileman v. *Ashdown* (1742) 2 Atk., at p. 481, *per* Lord Hardwicke, C. *Mackay* v. *Douglas* (1872) L. R. 14 Eq. 106.

In both these cases, the facts raise a presumption of an intent to defeat creditors.[a] In other cases, it is necessary for the person seeking to set aside the disposition, either to prove actual intention to defraud, or to raise a presumption of such intention by other means (*ante*, § 1713).[b]

(a) *Freeman* v. *Pope* (1870) L. R. 5 Ch. App. 538.
Cornish v. *Clark* (1872) L. R. 14 Eq. 184.
Mackay v. *Douglas*, *ubi sup.*
Gregg v. *Holland* [1902] 2 Ch., at pp. 373, 381.
(b) *Spirett* v. *Willows* (1864) 3 De G. J. & S. 293, as modified by *Freeman* v. *Pope*, *ubi sup.*

Subsequent creditors

1715. Subject to § 1714, the mere fact that a voluntary disposition does in fact defeat subsequent creditors, does not entitle such subsequent creditors to set it aside.

Ex parte Mercer (1886) 17 Q. B. D. 290.
Re Lane Fox [1900] 2 Q. B. 508.

[It was laid down, *obiter*, by Lord Westbury, in *Spirett* v. *Willows*, *ubi sup.*, at p. 302, that a different rule applied to creditors whose claims existed at the time of the disposition. But that view has been questioned by Lord Hatherley, in *Freeman* v. *Pope*, *ubi sup.*, at p. 543, and was not acted upon by Lord Romilly, M. R., in *Kent* v. *Riley* (1872) L. R. 14 Eq. 190. On principle, there seems to be no reason why a voluntary settlement which leaves the settlor solvent should be, *ipso facto*, void; even against existing creditors.]

Illusory consideration

1716. For the purposes of §§ 1714 and 1715, a voluntary disposition includes a disposition made for

a consideration so inadequate as to be illusory or merely colourable.

Mathews v. *Feaver* (1786) 1 Cox, 278.
Dewey v. *Bayntun* (1805) 6 East, 257.
Strong v. *Strong* (1854) 18 Beav. 408.
Re Maddever (1883) 27 Ch. D. 523.

[It has been held that, for the purposes of the 27 Eliz. (1584) c. 4, a voluntary conveyance may become a conveyance for value by the giving of subsequent consideration (*Prodgers* v. *Langham* (1663) 1 Sid. 133). But it is believed that this doctrine has never been applied to the statute of 1571.]

Remedy of creditors

1717. Any creditor as against whom any disposition is void under § 1712,[a] or the trustee in bankruptcy of the disposer,[b] is entitled to bring an action against the holders of the property comprised in it, to compel such holders to make the property available for the payment of the disposer's debts. And the property, when recovered, will not only be available for payment of all creditors who would have been entitled to bring actions to set aside the disposition, but will be available for payment of all the disposer's debts *pro ratâ*.[c]

(a) *Reese River Mining Co.* v. *Atwell* (1869) L. R. 7 Eq. 347. (It is not necessary that the creditor suing should have obtained a judgment or charge on the property (*ibid.*).)
Ideal Bedding Co. v. *Holland* [1907] 2 Ch. 157.

[The holder of a judgment or execution need not, however, sue on behalf of creditors generally (*Blenkinsopp* v. *Blenkinsopp* (1850) 12 Beav. 568; *Smith* v. *Hurst* (1852) 10 Hare, 30). Apparently, these cases are not overruled by *Reese River Co.*, *ubi sup.*]

(b) *Grimsby* v. *Ball* (1843) 11 M. & W. 531. The bankruptcy jurisdiction is the proper tribunal for the purpose (*Ex parte Butters* (1880) 14 Ch. D. 265).

(c) *Taylor* v. *Jones* (1743) 2 Atk. 600.
Richardson v. *Smallwood* (1822) Jac. 552.
Strong v. *Strong* (1854) 18 Beav. 408.
Jenkyn v. *Vaughan* (1856) 3 Drew. 419.

Subrogation of creditors' rights

1718. If there is in existence any creditor against whom a disposition is void under § 1712, and such creditor refuses to take steps to set aside the disposition, any other creditor of the disposer may do so; notwithstanding the fact that the disposition is not void against such other creditor.

Jenkyn v. *Vaughan*, *ubi sup.*
Freeman v. *Pope* (1869) L. R. 9 Eq. 206.
Crossley v. *Elsworthy* (1871) L. R. 12 Eq. 158.

Dispositions valid between parties

1719. Subject to the right of creditors to set it aside as against themselves under § 1712, the disposition in question will, unless otherwise invalid, be effectual between the parties to it, and other persons not being creditors of the disposer.

Blenkinsopp v. *Blenkinsopp* (1849) 12 Beav. 568.
Tarleton v. *Liddell* (1851) 17 Q. B. 390.
Ideal Bedding Co. v. *Holland* [1907] 2 Ch. 157.

[And, therefore, if there is any possibility of a surplus after paying all creditors, the Court will not direct the disposition to be cancelled, but merely order the holders of the property to concur in all acts necessary for making the property available for payment of the creditors (*Ideal Bedding Co.* v. *Holland*, *ubi sup.*).]

Purchaser without notice

1720. Whether a purchaser who claims under a fraudulent disposition as a *bonâ fide* purchaser for val-

uable consideration is affected with notice of the fraud, is a question of fact in each case.

Copis v. *Middleton* (1818) 2 Madd. 410.

[In this important case, Plumer, V. C., laid it down that neither (i) the disposer's insolvency, nor (ii) the fact that the disposer and the purchaser were near relations, nor (iii) evidence of inadequacy of price, nor (iv) failure of the purchaser to investigate the title, were of themselves sufficient to affect the purchaser with notice of the fraud. It has elsewhere been laid down that neither (i) knowledge by the purchaser that the disposer was in failing circumstances (*Re Gillo* (1891) 8 Morr. 157), nor (ii) knowledge that the effect of the purchase might be to defeat a particular creditor (*Holbird* v. *Anderson* (1793) 5 T. R. 235) or even creditors generally (*Re Cranston* (1892) 9 Morr., at p. 167; *Glegg* v. *Bromley* [1912] 3 K. B. 474), will necessarily affect the purchaser with notice of the fraud.]

Lapse of time

1721. (*Semble*) a creditor who has been defrauded, or is deemed to have been defrauded, by a disposition of property, is not barred by any lapse of time, from taking proceedings to avoid the disposition; so long as his debt is personally recoverable against the disposer. And the mere fact of delay, even unexplained, in enforcing his rights, will not deprive him of his remedy under the statute.

Re Maddever (1883) 27 Ch. D. 523.

[About the second part of the above § there can be no doubt; for the creditor's right is legal, not equitable. But, on principle, the period of limitation should run from the making of the disposition, not from the incurring of the debt. However, it would be difficult to bring such an action within the terms of the Limitation Act of 1623. In *Re Maddever*, *supra*, the creditor slept on his rights for ten years; but his claim, being by specialty, was not barred.]

NOTE

Section 2 of the Act of 1571 imposes substantial penalties, recoverable by penal actions, on persons making dispositions fraudulent under the Act. Such penalties are rarely enforced; but the existence of the section entitles the disposer to refuse, in the civil action to set aside the disposition, to answer questions; on the ground that to answer might incriminate him (*Michael* v. *Gay* (1858) 1 F. & F. 409). It should also be noted, that the effect of fraud, misrepresentation, mistake, etc., as between the parties to a disposition of property, has been already dealt with in Bk. I, Sect. III, Tit. II, §§ 81–90, *ante*.

TITLE II — UNDER THE BANKRUPTCY ACTS AND THE COMPANIES ACT

Act of bankruptcy

1722. A disposition which is fraudulent under Title I, or otherwise, is an act of bankruptcy,[a] and, if followed within three months by the presentation of a bankruptcy petition upon which an order of adjudication is made, will be void against the trustee in bankruptcy;[b] unless it was made for value before the date of the receiving order, in favour of a person who had not, at the time when it was made, notice of any available act of bankruptcy committed by the bankrupt.[c]

(a) Bankruptcy Act, 1883, s. 4 (1) (B).
Re Slobodinsky [1903] 2 K. B. 517.
(b) Bankruptcy Act, 1883, ss. 43, 44.
(c) *Ibid.*, s. 49.

[In *Re Badham* (1893) 10 Morr. 252, Vaughan Williams, J., refused to allow a *bonâ fide* creditor to take advantage of this exception, where the disposition had been made after the presentation of the bankruptcy petition. But this decision was distinguished, on grounds which are not very clear, by Bigham, J., in *Re Dunkley* [1905] 2 K. B. 683.]

Fraudulent preference

1723. Every disposition of property made, and every obligation incurred, by a person unable to pay his debts as they become due, from his own money, in favour of or in trust for any creditor, with a view of giving such creditor preference over his other

creditors, will be void (except as against a *bonâ fide* purchaser for valuable consideration through or under a creditor of the bankrupt), if such person becomes bankrupt on a petition presented within three months of such disposition or creation.[a] But a payment or transfer of property to a *bonâ fide* creditor, as the result of pressure genuinely applied by such creditor, or apprehended by the debtor, will not be a preference for this purpose; even though, in fact, it gives such creditor an advantage over the other creditors.[b]

(a) Bankruptcy Act, 1883, s. 48.
(b) *Ex parte Taylor* (1886) 18 Q. B. D. 295.
New, Prance & Co.'s Trustee v. *Hunting* [1897] 1 Q. B. 607.

[It is immaterial that the creditor is aware of the debtor's circumstances (*Ex parte Taylor*, *ubi sup.*), or that the liability of the debtor was not legally enforceable (*Re Tweedale*) [1892] 2 Q. B. 216).]

Avoidance of voluntary settlements

1724. Any voluntary settlement (as defined in § 1725) will (subject to § 1727) be void, as against his trustee in bankruptcy,[a] if the settlor becomes bankrupt within two years of the date of the settlement; and it will be void as against such trustee if the settlor becomes bankrupt within ten years of such date,[b] unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement,[c] and that the beneficial interest of the settlor

in such property[d] (had) passed to the trustee of such settlement[e] on the execution thereof.[f]

(a) When the creditors have been satisfied, the surplus goes to the persons claiming under the settlement (*Re Sims* (1896) 3 Man. 340).
(b) The dates are reckoned to the 'commencement of the bankruptcy,' i. e. to the first of the acts of bankruptcy committed within three months prior to the presentation of the petition (*Re Reis* [1904] 1 K. B. 451).
(c) If property, though passing under the settlement, passes to the settlor himself, it will not be deemed to be 'comprised in the settlement' for this purpose (*Re Lowndes* (1887) 18 Q. B. D. 677).
(d) The fact that the bare legal interest remains in the settlor, is immaterial (*Shrager* v. *March* [1908] A. C. 402 (P. C.)), e. g. he can satisfy the requirements of the Act by declaring himself a trustee of property.
(e) Or to the beneficiaries direct (*Re Lowndes, ubi sup.*).
(f) Bankruptcy Act, 1883, s. 47 (1).

[Of course, cases which fall within this provision are frequently also within the terms of the Act of 1571 (*ante*, Tit. I); and the settlor's trustee in bankruptcy has then the option of proceeding under either statute. But it may be useful to point out that s. 47 of the Bankruptcy Act is wider than the old statute of Elizabeth in that (i) it requires no proof of fraud, express or implied, (ii) it throws the onus of proof (even after two years) on the person upholding the settlement, (iii) it draws no distinction between 'existing' and 'subsequent' creditors. On the other hand, it is narrower than the statute of Elizabeth (i) by reason of its time limits, (ii) because proof of solvency after the execution of the settlement is a complete answer after the lapse of two years, (iii) because it only applies to dispositions of property intended to be retained by the donees.]

Definition of 'voluntary settlement'

1725. A settlement, for the purposes of § 1724 of this Title, means any conveyance or transfer of property[a] which is intended to be retained and preserved as the property of the transferee,[b] not being a conveyance or transfer made before and in consideration of marriage, or made in favour of a purchaser

or incumbrancer in good faith and for valuable consideration,[c] or a conveyance or transfer made to or for the wife or children of the settlor, of property which has accrued to the settlor after marriage in right of his wife.[d]

(a) Bankruptcy Act, 1883, s. 47 (3).

[This provision, apparently, applies also to the executory settlements described in the following §.]

(b) *Re Tankard* [1899] 2 Q. B. 57.
Re Plummer [1900] 2 Q. B. 790.

[I. e. a gift intended to be spent or consumed at once by the donee, or at his free disposal, is not a 'settlement' for this purpose.]

(c) Where the purchaser gives a consideration which manifestly applies only to part of the property transferred, the transfer will be valid as to that part, and invalid as to the rest (*Sturmey's Trustee* v. *Sturmey* (1912) 107 L. T. 718).

(d) Bankruptcy Act, 1883, s. 47 (1).

Executory settlements

1726. Any covenant or contract made by any person, in consideration of his or her marriage, for the future payment of money for the benefit of, or for the future settlement of property wherein, at the date of the marriage, the settlor had no interest, on, the settlor's wife, husband, or children, will, if such money or property is not in right of the settlor's wife or husband, be void, in the event of the settlor being adjudged bankrupt, against his trustee in bankruptcy, in so far as such covenant or contract has not been executed at the date of the commencement of the settler's bankruptcy.

Bankruptcy and Deeds of Arrangement Act, 1913, s. 13.

[The persons entitled under the covenant or contract will be able to rank for dividend in the bankruptcy; but only after claims of other creditors for valuable consideration have been satisfied. And any payment of money (other than premiums on a life policy), or transfer of property, made by the settlor in pursuance of the covenant or contract, will be void; unless the persons receiving it can prove either (i) that it was made two years before the commencement of the bankruptcy, *or* (ii) that such payment or transfer left the settlor solvent, *or* (iii) that it was made in pursuance of a covenant or contract to pay or transfer money or property expected to come to the settlor from or on the death of a named person, and was in fact paid or made within three months of the death of such person (*ibid.*).]

Purchaser from volunteer

1727. Notwithstanding the express words of § 1724, a purchaser in good faith and for valuable consideration from the donee under a voluntary settlement (as defined in § 1725) will be protected against the settlor's trustee in bankruptcy, if he acquires the property before the making of the receiving order against the settlor.

Carter's and Kenderdine's Contract [1897] 1 Ch. 776.
Re Hart [1912] 3 K. B. 6.

[In other words, 'void' in s. 47 (1) means 'voidable' (*Re Brall* [1893] 2 Q. B. 381).]

Mortgages by companies

1728. Every mortgage created by a company governed by the provisions of the Companies Clauses Act, 1845, must be entered in a register of mortgages and bonds kept by the company;[(a)] and every mortgage or charge created after 1st July, 1908, by a company registered under the Companies (Consoli-

dation) Act, 1908, and being of the kind specified in section 93 of such Act, will be void, so far as any security on the company's property or undertaking is thereby conferred, against the liquidator or any creditor of the company, unless it is registered with the Registrar of Joint Stock Companies within twenty-one days of its execution.[b]

(a) Companies Clauses Act, 1845, s. 45.

[No penalty seems to be prescribed for breach of this enactment.]

(b) Companies (Consolidation) Act, 1908, s. 93.
Saunderson & Co v. *Clark* (1913) XXIX T. L. R. 579.

[The personal liability for the loan is not destroyed. The mortgages to which the section applies are mortgages or charges (*a*) to secure debentures, (*b*) of or on uncalled capital of the company, (*c*) created or evidenced by instruments which, if executed by individuals, would require registration as bills of sale, (*d*) of or on any interest in land, (*e*) of or on any book debts of the company, and (f) any floating charge on the undertaking or property of the company. There are many detailed regulations in the section.]

Transfer of shares during winding up

1729. Every transfer of shares made after the commencement of the winding up of a company registered under the Companies (Consolidation) Act, 1908 (other than a transfer made, in a voluntary winding up, to, or with the sanction of, the liquidator) is void.

Companies (Consolidation) Act, 1908, s. 205.

[A winding up by the Court is deemed to commence with the presentation of the petition to wind up (*ibid.*, s. 139). A voluntary winding up commences with the passing of the resolution to wind up (*ibid.*, s. 183).]

Fraudulent preference by companies

1730. Any disposition of, or act relating to, property which, if made or done by or against an individual, would be deemed in his bankruptcy a fraudulent preference (*ante*, § 1723) will, if made or done by or against a company registered under the Companies (Consolidation) Act, 1908, be invalid.

Companies (Consolidation) Act, 1908, s. 210 (1).

[For the purposes of this §, the 'commencement' of the winding up (*ante*, § 1729 n.) is deemed to correspond with the act of bankruptcy of an individual (*ibid.*, s. 210 (2)).]

Floating charges

1731. Any floating charge (*ante*, Sect. XIII, Tit. IV, § 1647) on the undertaking or property of such a company created within three months of (? prior to) the commencement of the winding up, will, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except as to the amount of cash actually paid to the company in consideration for the charge, and interest at five *per cent. per annum*.

Ibid., s. 212.

NOTE

It has already been pointed out (*ante*, Sect. I. Tit. IV, § 1079) that a settlement by a person on himself of his own property (even though only of a life interest), with a provision that it shall go over on his bankruptcy, is void against the trustee in bankruptcy. Probably the rule applies to a married woman, in the cases in which she can be made a bankrupt (Married Women's Property Act, 1882, s. 1 (5); Bankruptcy Act, 1913, s. 12).

TITLE III — UNDER THE RULE AGAINST PERPETUITIES

Rule against Perpetuities

1732. Subject to §§ 1734–1738, *post*, any limitation by virtue of which any interest in any property may possibly arise or be transferred more than twenty-one years after the expiry of a life or lives in being [a] at the making of such limitation,[b] is wholly void;[c] and all limitations in the same conveyance subsequent to such limitation are also void.[d] For the purposes of this rule, a person *en ventre sa mère* is deemed to be born; whether he takes an interest under such limitation, or not.[e]

(a) The persons whose lives are chosen for this purpose need not take any interest under the limitation. But they must be ascertainable (*Re Moore* [1901] 1 Ch. 936).

(b) The rule (*ante*, Sect. VI, Tit. I, § 1470), that the exercise of a special power of appointment will be deemed to date from the settlement creating it, applies for the purposes of this calculation. (*Re Thompson* [1906] 2 Ch. 199; *Re Norton* [1911] 2 Ch. 27).

(c) *Cadell* v. *Palmer* (1833) 1 Cl. & F. 372.
Re Lord Stratheden [1894] 3 Ch. 265.

(d) *Beard* v. *Westcott* (1822) 5 B. & Ald. 801.
Monypenny v. *Dering* (1852) 2 De G. M. & G. 145.

[Mr. Gray, in his well-known work *The Rule Against Perpetuities* (§ 254), contends strongly that this application of the rule ought to be restricted to cases in which the subsequent limitations themselves transgress the main rule, or, at least, where they were manifestly intended to take effect after, not in lieu of, the limitations *primâ facie* invalid. But the wider application seems firmly fixed in English law. A limitation to take effect in *default* of exercise of a power which is void for remoteness is not, however, necessarily bad, if the power is not, in fact, exercised (*Re Abbot* [1893] 1 Ch. 54).]

(e) *Long* v. *Blackall* (1797) 7 T. R. 100.
Re Wilmer's Trusts [1903] 2 Ch. 411.
Villar v. *Gilbey* [1907] A. C., at pp. 144, 149.

[It will be noted that the suspension for gestation may occur, not only at the beginning or end of the period, but during its currency, e. g. to X for life, and afterwards to such of his children as shall attain 21. Here a posthumous child of X can take on attaining 21.]

[The Rule against Perpetuities, now so strictly applied by the Courts, was (substantially) invented by the judges to restrain the executory interests which grew up after the Statute of Uses (*ante*, Sect. I, Tit. VIII, § 1183). The older forms of future interests in land, viz. legal remainders, were considered, until lately, to be sufficiently restrained by the rule that a contingent remainder 'failed,' unless it was ready to take effect on the expiry of the 'particular' estate immediately preceding it. But executory limitations were (except in rare cases) indestructible by similar events; and, after considerable hesitation, the Courts adopted, with regard to them, the rule in the text, which is usually considered to have received its final shape in the case of *Cadell* v. *Palmer*, *ubi sup.* The rule is said (e. g. by Lord Kenyon in *Long* v. *Blackall*, *ubi sup.*) to have been modelled on the practice of strict settlements, by which estates tail were limited, after the life estate of the husband, to the unborn children of the marriage, and under which the youngest child must obviously have attained 21 within a few months after 21 years from his father's death, and so have been able to bar the entail. But it is obvious that the Rule against Perpetuities, in its final form, is a good deal less strict than the practice of strict settlements; inasmuch as it allows the 'life or lives in being' to be arbitrarily chosen. It is said by Mr. Gray (*op. cit.* § 178) that *Lloyd* v. *Carew* (1697) Pre. Ch. 72, was the first decision which allowed this.]

Limitations to which Rule applies

1733. In particular, the Rule against Perpetuities applies to the following limitations, viz.: —

(i) executory interests;

Cadell v. *Palmer*, *ubi sup.*
Re Lord Stratheden, *ubi sup.*

(ii) equitable contingent remainders;

Abbiss v. *Burney* (1880) 17 Ch. D. 211.

[The rule was said, in this case, to have been recognized for a long time; though no earlier decision was quoted. Obviously, the common law rule of 'failure' did not apply to equitable remainders; because the seisin was in the holders of the legal estate.]

(iii) copyhold contingent remainders;

[There seems to be no express decision on the point. But the reasoning in *Pickersgill* v. *Grey* (1862) 30 Beav. 352 is exactly the same as that of *Abbiss* v. *Burney*, *ubi sup.*; the freehold seisin being in the lord of the manor.]

(iv) covenants to convey;

L. & S. W. R. v. *Gomm* (1881) 20 Ch. D. 562.

[Probably, the covenant could be enforced by a purely personal action for damages; but not by a decree for specific performance.]

(v) options to purchase;

Corpn. of Worthing v. *Heather* [1906] 2 Ch. 532.

[Here again, the personal remedy is, probably, open to the person having the option.]

(vi) common law conditions (*ante*, Sect. III, Tit. I, § 1365).

Hollis' Hospital Case [1899] 2 Ch. 540.
Re Da Costa [1912] 1 Ch. 337.

(vii) restraints on anticipation (subject to § 1737, *post*);

Re Game [1907] 1 Ch. 276.

(viii) legal (socage) contingent remainders;

Re Ashforth [1905] 1 Ch. 535.

[This application of the rule was stoutly resisted by the more conservative type of legal mind; but it was assisted by the passing of the Contingent Remainders Act, 1877 (*ante*, Sect. I, Tit. VIII, § 1182). In *Re Frost* (1889) 43 Ch. D. 246, Kay, J., clearly foreshadowed the change, which was definitely adopted in *Re Ashforth*, *ubi sup.*]

(ix) creation of trusts for accumulation;

Browne v. *Stoughton* (1846) 14 Sim. 369, recognized as law in *Re Earl of Stamford* [1912] 1 Ch., at p. 353.

[Of course the *duration* of trusts for accumulation is still more severely restricted (*post*, Tit. IV). Here it is the commencement of the trust which is restricted.]

(x) creation of charges *in futuro;*

Edwards v. *Edwards* [1909] A. C. 275.

[It has been held by the Court of Appeal in Ireland, virtually overruling the earlier case of *Sulzer* v. *Rochford* [1906] 1 Ir. R. 399, that provisions for the extinguishment of charges are also within the rule (*Re Tyrrell's Estate* [1907] 1 Ir. R. 292; followed in *Re Donoughmore's Estate* [1911] 1 Ir. R. 211). There seems to be no doubt that *Re Tyrrell* is right on principle; inasmuch as the extinguishment of a charge must operate to confer a new interest in the property on some one else. But there seems to be no decision on the point in England.]

(xi) creation of future easements.

Sharpe v. *Durrant* (1911) 55 Sol. Jo. 423.

[It is said also that the Land Registry refuses to register reversionary leases to commence more than 21 years ahead; on the ground that such leases are void under the rule. *Sed quære.*]

Limitations to which the Rule does not apply

1734. The Rule against Perpetuities does not apply to:—

(i) mere personal covenants, even though the benefit of them is acquired by successive purchasers of land;

S. E. R. v. *Associated Portland Cement* [1910] 1 Ch. 12.

(ii) rights of re-entry in leases;

[This seems to be clearly recognized by implication by s. 11 (2) of the Conveyancing Act, 1882; and it is explained by Mr.

Gray (*op. cit.* § 303), on the ground that such right of re-entry is annexed to the reversion.]

(iii) mere powers, not being powers of disposition;

Re Earl of Stamford [1912] 1 Ch. 343.

(iv) trusts for payment of debts;

Ibid.

(v) contracts for renewal in leases;

Hare v. *Burges* (1857) 4 K. & J. 45.

[The reasoning does not appear to be very sound. But Wood, V. C., described the notion of a perpetuity attaching to such contracts as 'out of the question' (*ibid.*, p. 57).]

(vi) limitations for charitable purposes, following upon the failure of previous charitable limitations.

Christ's Hospital v. *Grainger* (1848) 1 Mac. & G. 460.
Tyler v. *Tyler* [1891] 3 Ch. 252.

[The first limitation to a charity must clearly observe the rule (*Re Bowen* [1893] 2 Ch. 491; *Re Lord Stratheden* [1894] 3 Ch. 265).]

Powers of appointment

1735. The fact that a power of appointment contemplates persons outside the rule does not make the power void; if it could be, in accordance with the terms of the settlement, and in fact is, exercised wholly in favour of persons within it.

Griffith v. *Pownall* (1843) 13 Sim. 393.
Re Bowles [1905] 1 Ch. 371.
Davies' and Kent's Contract [1910] 2 Ch. 35.

[Of course, if the power is exercised in favour of a class, some of whom do, and some do not, violate the rule, the whole appointment is bad (*Re Game* [1907] 1 Ch., at p. 280, *per* Warrington, J.).]

Limitations after estates tail

1736. A limitation to take effect on the expiry of an estate tail is not on that account void for perpetuity;[a] and a limitation which, if it stood alone, would not be too remote, is not void merely because it is to take effect at some period after the expiry of an estate tail.[b]

(a) *Faulkner* v. *Daniel* (1843) 3 Hare, 199.
Heasman v. *Pearse* (1871) L. R. 7 Ch. 275.
(b) *Re Haygarth* [1912] 1 Ch. 510.

[The reason is, that an estate tail may always be barred, and all limitations after it thus destroyed (*ante*, Sect. I, Tit. III, § 1057); and so the land is not made inalienable.]

Directions to settle and restraints on anticipation

1737. When a direction to settle,[a] or a restraint on anticipation,[b] is imposed upon a gift to the members of a class, and some of them are born at such a time as would make the direction, if carried out, valid, and some are not, the direction or restraint will be valid as to those who are so born, and invalid as to those who are not.

(a) *Re Russell* [1895] 2 Ch. 698.
(b) *Re Game* [1907] 1 Ch. 276.

'Mere machinery'

1738. Where there is a limitation which does not contravene the Rule against Perpetuities, but the

mode of carrying it out prescribed by the settlor or the parties would, if followed, do so, the mode may be regarded as surplusage, and the limitation will be good.

Re Daveron [1893] 3 Ch. 421.
Re Appleby [1903] 1 Ch. 565.
Re Coulson's Trusts (1908) 97 L. T. 754.

TITLE IV—UNDER THE RULES AGAINST ACCUMULATION

Rule against accumulation

1739. Even though it does not violate the Rule against Perpetuities, any limitation which directs accumulation, whole or partial, of the rents, issues, produce, or profits of any property beyond one of the four alternative periods following is (subject to § 1741, *post*) void for the excess, [a] viz.: —

(i) the life or lives of the disposer or disposers; *or*,

(ii) twenty-one years from the death of the disposer; *or*,

(iii) the minority or respective minorities of any person or persons who may be living or *en ventre sa mère* at the death of the disposer; *or*,

(iv) the minority or respective minorities of any person or persons who, under the trusts of the disposition would, for the time being, be entitled to the income directed to be accumulated.[b]

(a) *Griffiths* v. *Vere* (1803) 9 Ves. 127.

(b) Accumulations Act, 1800, s. 1.
Re Cattell [1913] 1 Ch. 77. (This case shows that the minorities in question need not begin till long after the settlement takes effect.)

[This statute was the direct outcome of the famous case of *Thellusson* v. *Woodford* (1798) 4 Ves. 227; 13 Ves. 209, in which

the Court of Chancery, and, on appeal, the House of Lords, felt themselves bound to uphold the provisions of the will of Mr. Peter Thellusson, who directed the income of a large fortune (amounting to more than half a million sterling) to be accumulated during the whole of the period allowed by the Rule against Perpetuities (*ante*, Tit. II), for the benefit of the persons ultimately entitled to the corpus. The Act of 1800 did not affect to be retrospective; but some modification of Mr. Thellusson's will was eventually made by private Act of Parliament (3 & 4 Will. IV (1833) No. 27). It is, perhaps, worth pointing out, that a direction to accumulate during any part of the interest of an absolute owner in fee, for his ultimate benefit, would be void, as attempting to fetter the disposition of a fee (*Re Trevanion* [1910] 2 Ch. 538). See *ante*, Sect. I, Tit. II, § 1050.]

Undisposed of surplus

1740. In so far as such direction as is described in § 1739 is void, the rents, issues, produce, or profits which it directs to be accumulated will belong to the person or persons who would have been entitled thereto if such accumulation had not been directed.

Accumulations Act, 1800, s. 1.

[This provision, as Lord Eldon pointed out in *Griffiths* v. *Vere*, *ubi sup.*, at p. 136, is by no means easy to interpret. But it seems now to be settled, that the surplus income goes, not to the persons who would have enjoyed the corpus of the property but for the direction, but as undisposed of by the settlement (*Re Perkins* (1909) 101 L. T. 345).]

Exceptions from rule

1741. The provisions of § 1739 have no application to directions touching: —

(i) payment of debts;

[It would appear that the debts in question need not be those of the settlor himself (*Re Hurlbatt* [1910] 2 Ch. 553), and that the accumulation for debts may be even beyond the limits of Perpetui-

ties (*Southampton* v. *Hertford* (1813) 2 Ves. & B., at p. 65, *per* Grant, M. R.; *Bateman* v. *Hotchkin* (1847) 10 Beav. 426; *Re Earl of Stamford* [1912] 1 Ch. 343).]

(ii) the raising of portions for children of the disposer or of any person taking any interest under the disposition;

(iii) the produce of timber or wood upon any land.

Accumulations Act, 1800, s. 2.

Accumulation for investment in land

1742. It has not been lawful for any person, since 27th June, 1892, to make any disposition of any property, in such a manner that the income shall be accumulated, wholly or partially, for the purchase of land only, for any longer period than the minority or respective minorities of any person or persons who, if of full age, would, for the time being, be entitled under the disposition to such income.

Accumulations Act, 1892, s. 1.

[The very curious wording of this statute leaves the effect of disobedience to its provisions in a doubtful state. No penalty or alternative is prescribed. It is not even said that a disposition contrary to the terms of the statute will be invalid; though, presumably, this would be the case (*Re Danson* (1895) 13 R. 633). Finally, it may be pointed out that, though obviously framed with reference to the Act of 1800, the Act of 1892 contains no direction that it shall be read in connection with the earlier statute.]

SECTION XVI

CO-OWNERSHIP

TITLE I — GENERAL

Definition

1743. Co-ownership includes every kind of ownership by two or more persons which involves the undivided enjoyment of property, and, in the case of the co-ownership of a present interest, in so far as such interest is capable of possession, undivided possession. The forms of co-ownership recognized by English law are (i) joint ownership, (ii) ownership in common, and (iii) in the case of real estate only, co-parcenary. Owners of successive interests in the same land are not co-owners.

Baring v. *Nash* (1813) 1 V. & B. 551.

[It may be noted that the assignee of any right comprised in a copyright has, as respects the right assigned, and the assignor has, as respects the rights not assigned, the same rights as an ordinary owner of the copyright (*ante*, Sect. XIII, Tit. VII §§ 1681–1684). (Copyright Act, 1911, s. 5 (3).) *Quære:* is this co-ownership?]

Powers of co-owners

1744. The powers of co-owners of land and chattels corporeal to bring actions for injury to their respective rights, against one another and strangers, are those specified in Bk. II, Pt. III, Sect. I, Tit. III,

§ 765; Sect. II, Tit. I, § 824, Tit. II, § 826, and Sect. III, Tit. II, § 875, *ante;* and the powers of co-contractors, in respect of the co-ownership of choses in action arising out of contract, those specified in Bk. II, Pt. I, Sect. VII, §§ 367–371, *ante.*

[One joint tenant or co-parcener may distrain in the name of all (*Robinson* v. *Hoffman* (1828) 4 Bing. 562 (joint tenants); *Leigh* v. *Shepherd* (1821) 2 Brod. & B. 465 (co-parceners)).]

Account of profits

1745. Subject to § 1746 *post*, and to any agreement, express or implied, every co-owner is entitled to an account of the profits of the common property, with a view of obtaining his proper share.

Thornley v. *Thornley* [1893] 2 Ch. 229 } (joint tenants).
Dunbar v. *Dunbar* [1909] 2 Ch. 639 }
Baxter v. *Hosier* (1839) 5 Bing. N. C. 288 (owners in common).

[The old action of Account at common law involved the appointment of auditors, and was highly technical. Accounts are now taken before the Master in Chambers or the Official Referee of the Court.]

Joint patentees

1746. Where, after the 31st December, 1907, a patent has been granted to two or more persons jointly, they are, unless (it is) otherwise specified in the patent, to be treated, for the purpose of the devolution of the legal interest therein, as joint owners. But, subject to any contract to the contrary, each of such persons is entitled to use the invention for his own profit without accounting to the others, but not

to grant a license without their consent; and, on the death of any such person, his beneficial interest devolves on his personal representative as part of his personal estate.

Patents and Designs Acts, 1907, s. 37.

[The rule that one co-owner of a patent need not account to the other or others was laid down in *Steers* v. *Rogers* [1893] A. C. 232.]

Rights of co-patentees and co-owners of trade-marks

1747. Each co-owner of a patent [a] or trade-mark [b] has a separate right to sue alone for an injunction and an account (or, *semble*, for damages) in respect of an injury to his rights by a third party.

(a) *Sheehan* v. *G. E. R.* (1880) 16 Ch. D. 59.
(b) *Dent* v. *Turpin* (1861) 2 J. & H. 139.

Partition

1748. Every co-owner of land has a right to a partition of the land, i. e. to a division of the land in severalty between himself and his co-owners.

Litt. 247 (co-parceners).
31 Hen. VIII (1539) c. 1 (estates of inheritance) } (joint tenants and
32 Hen. VIII (1540) c. 32 (estates for life or years) } tenants in common).
Copyhold Act, 1894, s. 37 (copyholds).

[Subject to § 1749, *post*, the right to partition is absolute (*Mayfair Co.* v. *Johnston* [1894] 1 Ch. 508). But a co-owner for a limited interest cannot (except under statutory powers (Settled Land Act, 1882, s. 3 (iv))) insist on a partition to endure beyond his interest (*Baring* v. *Nash* (1813) 1 V. & B. 551). The old method of partition was by a sheriff's jury, under the writ De Partitione Facienda; and the land was divided by metes and bounds. Owing to the inconveniences attending this method, it was superseded in

practice by a Commission in Chancery. Partition is now effected by a reference to Chambers, the writ of Partition having been abolished by the Real Property Limitation Act, 1833, s. 36. The right of a 'commoner' is not to partition, but, in certain cases, and subject to certain restrictions, to inclosure (see *ante*, Sect. I, Tit. IX, § 1210). It is remarkable that there appears to be no means of enforcing a partition (or even a sale and division of the proceeds) of pure personalty.]

Sale in lieu of partition

1749. In an action by co-owners of land for partition or a sale and distribution of the proceeds,[a] the Court may, on request of any of the parties interested, if it thinks that a sale and distribution of the proceeds would be more beneficial for the parties than a division of the property, order a sale accordingly.[b] If a sale and distribution are requested by a party or parties interested to the extent of one moiety of the value of the property, the Court must, unless it sees good reason to the contrary, direct a sale accordingly.[c] When any party interested requests a sale, the Court may, if it thinks fit, unless the other parties interested, or some of them, undertake to purchase the share of the partv requesting the sale, direct a sale accordingly.[d]

(a) Partition Act, 1876, s. 7.
(b) Partition Act, 1868, s. 3.
(c) *Ibid.*, s. 4.
(d) *Ibid.*, s. 5.

[It is not quite easy to distinguish between the first and third alternatives. Probably the first only applies where a partition would be manifestly difficult or disadvantageous, while the third is intended to cover cases in which the merits of the rival processes are more even. It will be observed, that the Court has no power under the

Acts to order a sale against the wish of all parties. The Acts contain many useful improvements in the procedure of partition actions.]

Share of husband and wife

1750. (*Semble*) When there is a conveyance of property to a husband and wife and others, whether as joint owners or owners in common, it is a question of construction whether the husband and wife take only a single share, or each a share equal to that of each of the others.

Litt. s. 291, followed by
Re March (1883) 24 Ch. D. 222.
Re Jupp (1888) 39 Ch. D. 148.
Re Dixon (1889) 42 Ch. D. 306.
Re Jeffery (1914) 110 L. T. 11.

[*Semble:* Since the passing of the Married Women's Property Act, 1882, the husband and wife, if they take a single share, will now, as between themselves, stand in the same relation as the other co-owners (*Thornley* v. *Thornley* [1893] 2 Ch. 229; *Dunbar* v. *Dunbar* [1909] 2 Ch. 639). Before the Act, a conveyance of real estate to husband and wife, not for her separate use, in words which would, in the case of strangers, have made them joint tenants, made them 'tenants by entireties.' The husband was sole tenant during the marriage; but neither one nor both could destroy the wife's right of survivorship (*Thornley* v. *Thornley*, *ubi sup.*, at p. 233, *per* Romer, J.). In the case of chattels, before the Married Women's Property Act, the husband would have got all.]

TITLE II — JOINT OWNERSHIP

How created

1751. Any conveyance or transfer of property to two or more persons, without words of severance, will (subject to §§ 1752, 1754, 1755, *post*) create a joint ownership in such persons. The interests of all joint owners must be of the same extent and duration.

Litt. s. 277 (land).
Cock v. *Burrish* (1686) 1 Vern. 425
Lady Shore v. *Billingsley* (1687) *ibid.*, 482 } (chattels).
Morley v. *Bird* (1798) 3 Ves. 628.

[Joint owners are said to have four unities, viz. (i) interest, (ii) title, (iii) time, and (iv) possession. But, since the passing of the Statute of Uses (1535), it has been possible, by means of future uses, to make the interests of joint tenants of land vest at different times, so long as the seisin out of which they arise is conferred *uno ictu*; e. g. by a limitation to the use of all the children of A, born and to be born (*Stratton* v. *Best* (1787) 2 Bro. C. C. 233).]

Joint entails

1752. A conveyance of land to two persons who cannot possibly intermarry, or to three or more persons, and the heirs of their bodies,[a] will make such persons joint tenants for life, with remainder to them as tenants in common in tail of equal shares.[b] But a similar conveyance to two persons who might possibly intermarry, will make

such persons tenants in tail special (*ante*, Sect. I, Tit. III, § 1054).[c]

(a) Presumably, the same effect would be produced by the use of the modern form 'in tail.'
(b) Litt. ss. 283, 284.
Co. Litt. 184 a.

[It is said by Coke (Co. Litt. 182 b) that neither can convey away his remainder during his life. But the case quoted in Coke's learned editor, Butler (viz. *Huntley's Case* (1572) Dyer, 326 a) certainly does not bear out this remarkable statement; and Coke himself quotes no authority. Why should not each tenant in tail disentail his own share? (Fines and Recoveries Act, 1833, s. 23; *Tufnell* v. *Borrell* (1875) L. R. 20 Eq. 196).]

(c) Co. Litt. 20 b.

Right of survivorship

1753. On the death of one joint owner, his interest passes (subject to §§ 1754–1756, *post*) to the surviving joint owner or owners; notwithstanding any disposition by the testament of the deceased joint owner.

Litt. ss. 280–282, 287.

[This is the most characteristic feature of joint ownership; and, while it makes that form of ownership highly convenient in some cases (e. g. for the interests held by trustees, who are invariably made joint owners), in others it tends to work injustice. Various modifications (§§ 1754–1756, *post*) have been introduced to meet the latter difficulty.]

Partners

1754. When property is vested in two or more persons jointly as partners in trade or business, for any legal interest, that interest will, on the decease of one of them, survive to the other or others. But

such other or others will, so far as necessary, be deemed trustees for the deceased partner's representatives of the beneficial interest (if any) which belonged to the deceased partner at the time of his death.

Partnership Act, 1890, s. 20 (2) (land).
Co. Litt. 182 a.
Jeffereys v. *Small* (1683) 1 Vern. 216.
Morley v. *Bird* (1798) 3 Ves., at p. 631, *per* Arden, M. R. } (chattels).

[The language of reporters and text-writers would sometimes lead one to think that, even at law, in the case of chattels, there was no survivorship. But the inconvenience of such a doctrine would be so great, that it is better to assume that only equitable interests are affected by the special rule. As to land, the Partnership Act is admirably clear.]

Joint mortgagees

1755. When a single sum of money is advanced on mortgage by two or more persons, whether in equal or unequal shares, such persons are presumed to be owners in common of the mortgage money in proportion to their respective contributions; even though the security is conveyed to them as joint owners.[a] And, even if it is expressly stated in the mortgage that the money belongs to the mortgagees on a joint account in equity as well as at law, parol evidence of facts (but not of mere statements of intention)[b] will be admitted to show that it was intended that the money should belong beneficially to the mortgagees as tenants in common.[c]

(a) *Petty* v. *Styward* (1631) 1 Rep. in Cha. 31.
Rigden v. *Vallier* (1751) 2 Ves. Sr., at p. 258, *per* Lord Hardwicke, C.

Morley v. *Bird* (1798) 3 Ves., at p. 631, *per* Arden, M. R.
Robinson v. *Preston* (1858) 4 K. & J., at p. 511, *per* Wood, V. C.
(b) *Harrison* v. *Barton* (1860) 1 J. & H., at p. 294, *per* Wood, V. C.

[This was a case of joint purchase; but, *semble*, the rule must be the same for mortgages. Such a statement protects the mortgagor who pays the debt to the survivor or survivors (Conveyancing Act, 1881, s. 61 (1).]

(c) *Re Jackson* (1887) 34 Ch. D. 732.

Joint purchasers

1756. There is no such presumption as that stated in § 1755 in the case of joint purchasers, who contribute equally to the purchase money. But, even in such cases, parol evidence of facts may be admitted to show the intentions of the parties.[b] And purchasers who contribute unequally to the purchase money are presumed to be beneficially interested, as owners in common of the property purchased, in proportion to the amounts of their respective contributions.[c]

(a) *Lake* v. *Gibson* (1729) 1 Eq. Ca. Ab. 291.
Aveling v. *Knipe* (1815) 19 Ves. 441.
Garrick v. *Taylor* (1860) 29 Beav. 79.
Harris v. *Ferguson* (1848) 16 Sim. 308.
Robinson v. *Preston* (1858) 4 K. & J., at p. 510, *per* Wood, V. C.

[In *Harris* v. *Ferguson*, *ubi sup.*, the contribution was unequal; and yet the purchasers were held joint owners. But the circumstances were special. The rule in the text does not apply to a purchase of the equity of redemption by mortgagees who are owners in common of the mortgage money (*Edwards* v. *Fashion* (1712) Pre. Cha. 33).]

(b) *Harrison* v. *Barton* (1860) 1 J. & H. 287.
(c) *Lake* v. *Gibson*, *ubi sup.*
Robinson v. *Preston*, *ubi sup.*

Express severance

1757. Any valid alienation, legal or equitable,[a] of the share of any joint owner, whether to a person not being a joint owner with him, or to one of two or more being joint owners with him, works a severance of the legal or equitable interest, respectively, in such share, and makes the alienee an owner in common with the other joint owner or owners.[b] But (*semble*) a mere demise for years of a joint share at a rack rent does not effect a severance of the reversion.[c]

(a) E. g. a covenant to settle on marriage (*Caldwell* v. *Fellowes* (1870) L. R. 9 Eq. 410; *Re Hewett* [1894] 1 Ch. 362), or a contract to sell (*Brown* v. *Raindle* (1796) 3 Ves., at p. 257, *per* Arden, M. R.), or an equitable charge on a reversionary interest (*Re Sharer* (1912) 57 Sol. Jo. 60).

(b) Litt. s. 294, 304. (But the alienation only affects the share of the alienor; and, if there were two or more other joint owners, they will continue to be such, as regards one another.)

(c) *Palmer* v. *Rich* [1897] 1 Ch. 134. (Warrington, J., however, in *Napier* v. *Williams* [1911] 1 Ch., at p. 369, thought there would be a severance as to the term.)

[Even in the case of a woman married before 1882, marriage of a female joint tenant did not of itself work a severance of her share, either in freeholds or leaseholds (*Palmer* v. *Rich*, *ubi sup.*). And it is doubtful whether there can be a severance of a joint ownership of a legal chose in action (*Re McKerrell* [1912] 2 Ch., at p. 653).]

Implied severance

1758. Any circumstances from which it may be inferred that joint owners have agreed to treat the joint ownership as at an end, without converting their interests into severalty, will (subject to § 1757) work a severance of their beneficial interests.

Williams v. *Hensman* (1861) 1 J. & H. 546.
Palmer v. *Rich*, *ubi sup.*

TITLE III — OWNERSHIP IN COMMON

Original creation

1759. Any conveyance or transfer of property (*semble*) other than a legal chose in action [a] to two or more persons with words of severance,[b] or with express direction to hold in common, will (subject to Tit. I, § 1746, *ante*) create ownership in common between such persons. Owners in common may have unequal though undivided shares; [c] and there is no right of survivorship amongst them.[d]

(a) Before the Judicature Act, 1873, s. 25 (6), there could not have been a legal ownership in common of a legal chose in action in the nature of a debt (*Re McKerrell* [1912] 2 Ch., at p. 653); and, regard being had to *Forster* v. *Baker* (*ante*, Sect. XIV, Tit. I, § 1698, n. (a)), it seems doubtful whether the Act has altered the law in that respect. For the present rights of co-owners of a patent, see *ante*, Tit. I, §§ 1746, 1747.

(b) Such words are 'equally to be divided' (*Hood* v. *Stokes* (1753) 1 Wils. 341), 'share and share alike' (*Rigden* v. *Vallier* (1751) 2 Ves. Sr., at p. 256, *per* Lord Hardwicke, C.), 'equally,' 'among,' 'between,' (*Morley* v. *Bird* (1798) 3 Ves., at 631, *per* Arden, M. R.).

(c) Litt. s. 294.
Sturton v. *Richardson* (1844) 13 M. & W. 17.

(d) Litt. s. 321.

Creation by severance

1760. Ownership in common may also be created by any act or series of acts which works a severance of a joint ownership,[a] or by an alienation by an owner in severalty of any share in his ownership to

another to be held in undivided ownership with him.[b]

(a) *Ante*, Tit. II, §§ 1757, 1758.
(b) Litt. s. 298.

Limitation in remainder

1761. A limitation of land by way of contingent remainder (*ante*, Sect. I, Tit. VIII, § 1172) to the heirs, or the heirs of the body, of two living persons who cannot intermarry, makes such heirs, if they take at all, tenants in common without words of severance.

Justice Windham's Case (1589) 5 Rep., at 8a.
Nightingale v. *Quartley* (1787) 1 T. R. 630.

[*Semble:* if the limitation were executory, the heirs might take as joint tenants (*ante*, Tit. II, § 1751 n.).]

TITLE IV — CO-PARCENARY

1762. Where, under the law of inheritance, real estate descends upon two or more persons as co-heirs of the purchaser or person last entitled, such persons are said to hold the estate as co-parceners. *How created*

Litt. s. 241.
Inheritance Act, 1833, s. 2.
Law of Property Amendment Act, 1859, s. 19.

[The rules of inheritance will be dealt with in Book V. Broadly speaking, all females in the same degree of inheritance take equally at common law; and also all males in the same degree in gavelkind.]

1763. There is no right of survivorship among co-parceners; but the co-parcenary continues by descent until a co-parcener alienes his or her share.[a] The alienee then holds as tenant in common with the other co-parcener or co-parceners; but the latter, if more than one, continue (until severance) to hold as co-parceners among themselves.[b] *No survivorship*

(a) Co. Litt. 164.
(b) Litt. 262.
Co. Litt. 173 b.

1764. The shares of co-parceners are distinct, though undivided; and, notwithstanding the Inheri- *Distinct shares*

tance Act, 1833, will descend separately to the heirs of each co-parcener.

Cooper v. *France* (1850) 19 L. J. Ch. 313.

[S. 2 of the Inheritance Act, 1833, provided that descent should in all cases be traced from the purchaser. G purchased land and died, leaving two daughters, E and S. E died intestate, leaving one son; and it was contended that he and S, the surviving daughter of G, each inherited one half of E's moiety, as co-heirs of G. But the Court held that E's son took the whole of E's share. It is, however, quite clear that, in the second generation, the shares of co-parceners need not necessarily be equal (Co. Litt. 164 b).]

SECTION XVII

FIDUCIARY OWNERSHIP (TRUSTS)

TITLE I—GENERAL

1765. A trust is an obligation to hold and administer or deal with property conscientiously for the benefit of a person or persons other than the person subject to the obligation. *Definition*

Re Williams [1897] 2 Ch., at p. 19, *per* Lindley, L. J.

[The origin of the 'use, trust, or confidence' has been briefly described in Sect. I, Tit. XI, § 1304 n.; where it is pointed out that, by means of a strict judicial interpretation of the Statute of Uses, three classes of uses escaped the operation of that statute, and remained, under the name of 'trusts,' still recognized only by Courts of Equity. To these, later developments added other equitable interests; but by far the most important example of equitable interests is still the trust, which has extended beyond its original scope as a scheme for the protection of beneficial interests in land from the rigorous requirements of the common law, and is now freely applicable to all classes of beneficiaries and all kinds of proprietary rights. Every completely constituted trust must contain four elements, viz. (i) a trustee or trustees, (ii) a beneficiary or beneficiaries (*cestui que trustent*), who may include the or a trustee or trustees, but must not be identical with him or them, (iii) property the subject matter of the trust, and (iv) an obligation, enforceable in a Court of Equity, on the trustee or trustees to administer or deal with the property for the benefit of the beneficiaries (*Knight* v. *Boughton* (1844) 11 Cl. & F., at p. 551, *per* Lord Cottenham; *Re Williams* [1897] 2 Ch., at p. 19, *per* Lindley, L. J.). The passing of the Judicature Acts, though it has made all branches of the Supreme Court tribunals administering both law and equity, has

not (at least directly) affected the peculiar position of trusts as equitable interests based on conscientious obligation. Where no such obligation can be enforced against the legal owner of the property alleged to be the subject matter of the trust, there is no trust. And a beneficiary of full age and capacity, absolutely entitled to the trust property, or even (in the case of pure personalty) an undivided share thereof, can call upon the trustee to convey to him the legal ownership, and thus put an end to the trust (*Re Marshall* [1914] 1 Ch. 192).]

Peculiar trusts

1766. Generally speaking, every trust imposes upon the trustee a specific obligation to fulfil the precise directions of the trust. But—

(i) a trust may be so constituted as to leave it entirely to the discretion of the trustee in what manner and to what extent it shall be carried out ('discretionary trust');

Train v. *Clapperton* [1908] A. C. 342.

[In these cases, so long as the trustees act *bonâ fide*, they cannot be interfered with. But the surplus of the property (if any) cannot be claimed by the trustee beneficially.]

(ii) property may be disposed of in such a way as to authorize the takers to expend the whole or part of it, at their discretion, for the maintenance of specific animals or non-sentient objects;

Re Dean (1889) 41 Ch. D. 552.

[Of course, only a human being can enforce a trust; but, in *Re Dean*, it was held that the so-called trustees, if they did not carry out the direction, could not retain the property for their own benefit. But such a provision must observe the Rule against Perpetuities (*Re Jones* (1898) 79 L. T. 154).]

(iii) in the case of a charitable trust, the choice of the institutions or objects to be benefited, as well as the mode of carrying out the trust, may be left entirely to the trustee or to the Court.

Re Allen [1905] 2 Ch. 400.
Re Garrard [1907] 1 Ch. 382.
A.-G. v. *Mathieson* [1907] 2 Ch. 383.

[But if there is any liberty to expend an unspecified part of a fund so left on objects not charitable, the whole trust will be bad for uncertainty (*Re Sidney* [1908] 1 Ch. 488; *Dunne* v. *Byrne* [1912] A. C. 407).]

Precatory trusts

1767. It is a question of construction for the Court in each case, whether words of advice or entreaty accompanying a gift of property are intended to create a trust binding on the donee, or are mere expressions of the wishes of the donor, which have no legal effect.

Comiskey v. *Bowring-Hanbury* [1905] A. C. 84.
Re Conolly [1910] 1 Ch. 219.
Re Atkinson (1911) 80 L. J. Ch. 370.

[Such questions arise almost exclusively on testamentary gifts; and the tendency of the Courts is now against the recognition of 'precatory trusts' (*Re Atkinson*, *ubi sup.*, at p. 372, *per* Cozens-Hardy, M. R.).]

Classification of trusts

1768. A trust may be created by express words ('express trust'), by conduct of the parties ('implied trust'), or by operation of law ('constructive trust').[a] No technical language or special form is necessary to

create an express trust;[b] except that a trust of lands, tenements, or hereditaments, must be manifested and proved by some writing signed by the party who is by law entitled to declare such trust,[c] and that no testamentary trust can be created, except by testament executed in conformity with the requirements of the Wills Act, 1837.[d]

(a) *Soar* v. *Ashwell* [1893] 2 Q. B. 390. (As was pointed out in this case, these distinctions are not always consistently employed.)
(b) *Re Atkinson* (1911) 80 L. J. Ch., at p. 371, *per* Cozens-Hardy, M. R.
(c) Statute of Frauds (1677) s. 7.

[It will be observed that an express trust of lands need not be created by writing. It is sufficient if it is 'manifested and proved' by writing, which may be drawn up long after the creation of the trust (*Forster* v. *Hale* (1798) 5 Ves. 308); and the requirements of the statute do not extend to implied or constructive trusts (*ibid.*, s. 8).]

(d) The Court will not allow a devisee or legatee to retain for his own benefit property as to which he was clearly informed before the testator's death that it was intended to be held by him for the benefit of other persons (*Tee* v. *Ferris* (1856) 2 K. & J. 357; *McCormick* v. *Grogan* (1869) L. R. 4 H. L. 82; *Re Maddock* [1902] 2 Ch. 220). But such knowledge only binds persons who acquired it before the testator's death, even if the others are devisees in common with them (*Tee* v. *Ferris*, *ubi sup.*); and if they refuse to undertake the trust, or the object of the trust is unlawful, there are no means of enforcing it. Where there is a devise to joint devisees, and one of them was informed of the trust before the making of the testament, his knowledge binds both (*Russell* v. *Jackson* (1852) 10 Hare, 204); if his knowledge was acquired between the making of the testament and the testator's death, he only is bound (*Re Stead* [1900] 1 Ch. 237).

Imperfectly constituted trusts

1769. Where there has been an imperfect attempt to constitute a valid trust, and the attempt has failed,

either from the omission of some formality,[a] or because the property intended to be the subject matter of the trust was not then in existence,[b] the Court will not enforce the completion of the trust, except on the application of persons who have given (or are deemed to have given) [c] valuable consideration.

(a) *Milroy* v. *Lord* (1862) 4 De G. F. & J. 264.
Richards v. *Delbridge* (1874) L. R. 18 Eq. 11.

[These were cases of imperfect assignments, intended to pass the ownership of the property. But a binding trust may clearly be created without assignment of property, if the settlor declares himself, in unmistakable terms, to hold the property in trust for the beneficiaries (*Wheatley* v. *Purr* (1837) 1 Keen, 551).]

(b) *Re Ellenborough* [1903] 1 Ch. 697.
(c) e. g. children under a marriage settlement. (But, if the trust is enforced by a purchaser for value, it will enure also for the benefit of volunteers, at any rate as against the settlor and his representatives (*Davenport* v. *Bishop* (1846) 1 Ph. 698).)

Implied trusts

1770. Subject to § 1769, an implied trust will be deemed to have been created whenever, from the conduct of the parties to a transaction involving the transfer or dealing with property, the Court considers that it was the intention of the parties that a trust should be created. In particular: —

(i) when, by direction of a purchaser of property, the conveyance of such property is made to a third person, not being a person *in loco filii* of the purchaser, such third person will be presumed to be a trustee for the purchaser;

Ryall v. *Ryall* (1739) 1 Atk. 59.

[Where the transferee is *in loco filii* of the purchaser, the transaction is deemed to be an advancement by the latter for the benefit of the transferee (*Dyer* v. *Dyer* (1788) 2 Cox, 92).]

(ii) when the owner of pure personalty transfers it into the names of himself and a stranger (being a volunteer), a resulting trust for the benefit of the transferor will be presumed, in the absence of evidence to the contrary;

Marshal v. *Crutwell* (1875) L. R. 20 Eq. 328.
Re Eykyn's Trusts (1877) 6 Ch. D. 115.
Standing v. *Bowring* (1885) 31 Ch. D., at p. 287, *per* Cotton, L. J.

[*Semble:* the rule has no application to land; and a transfer into the names of a transferor and a person *in loco filii* towards him raises a presumption of advancement (*Re Eykyn's Trusts*, *ubi sup.*). Formerly a wife stood in such a position towards her husband; and, *semble*, the passing of the Married Women's Property Act, 1882, has not made any difference in this respect (*Dunbar* v. *Dunbar* [1909] 2 Ch. 639). It seems much more difficult to say whether or not the Act has enabled the presumption of advancement to be raised in the case of a transfer or purchase by a married woman (*Re Ashton* [1897] 2 Ch. 574).]

(iii) when, either from the failure of the beneficiaries, the failure or illegality of the objects of the trust, the vagueness or incompleteness of the directions given to the trustees, or otherwise, the primary purposes of a trust have ceased to exist, or have never existed, there will be an implied or 'resulting' trust of the undisposed of property, for the benefit of the settlor or his representatives.

Ackroyd v. *Smithson* (1780) 1 Bro. C. C. 502.
Page v. *Leapingwell* (1812) 18 Ves. 463.
Merchant Taylors' Co. v. *A. G.* (1871) L. R. 6 Ch. App., at p. 518, *per* James, L. J.

[Formerly, in the case of land, if the settlor and his representatives failed, the trustees could retain the property for their own benefit (*Burgess* v. *Wheate* (1757) 1 Ed. 177). But the Crown now claims under the Intestates' Estates Act, 1884, s. 4. And the Crown was always entitled, in such cases, to pure personalty, as *bona vacantia* (*Re Gosman* (1880) 15 Ch. D. 67). Care must, however, be taken to distinguish between a trust, and an absolute gift with mere directions as to user (*Re Andrews' Trust* [1905] 2 Ch. 48), or a similar gift subject simply to charges (*King* v. *Denison* (1813) 1 V. & B. 260). In such cases, the donee is entitled to retain the gift, notwithstanding the impossibility of carrying out the directions, or the satisfaction of the charges. And, where a settlor has transferred property to trustees for the purpose of carrying out an illegal object, the settlor may find it impossible to recover the property, if the illegal purpose or any substantial part of it has been carried out (*Re Great Berlin Steamboat Co.* (1884) 26 Ch. D. 616).]

Voluntary conveyance

1771. A mere voluntary conveyance, either of land or (*semble*) of pure personalty, to a stranger, does not, of itself, raise any presumption of a resulting trust.

Lloyd v. *Spillet* (1740) 2 Atk. 148 (land).
Young v. *Peachey* (1741) *ibid.*, 248.
George v. *Bank of England* (1819) 7 Price, 651, *per* Richards, C. H. (personalty). But see
Fowkes v. *Pascoe* (1875) L. R. 10 Ch. App. 343.

Constructive trust

1772. A constructive trust arises when a trustee has received, in his capacity as such, property which, though not comprised in an express trust, he is not

legally entitled to retain for his own benefit,[a] or where a stranger to the trust has received property belonging to the trust in circumstances which do not entitle him to retain it as against the beneficiaries.[b] Such property is held subject to a constructive trust for the beneficiaries, under, and on the terms of, the original trust.

(a) *Keech* v. *Sanford* (1726) Sel. Ca. Cha. 61.
Griffith v. *Owen* [1907] 1 Ch. 195.

[A trustee is not, in the absence of special circumstances, allowed to make a profit out of his trust; and will be compelled to account, for the benefit of the trust, even for incidental gains. The cases in which this rule is applied are stated in Tit. III., § 1796, *post*.]

(b) *Smith* v. *Patrick* [1901] A. C. 282.
Soar v. *Ashwell* [1893] 2 Q. B., at p. 405, *per* Kay, L. J.

Trust for unlawful purposes

1773. Any trust which has for its substantial aim the achievement of any illegal purpose, is void as regards that purpose, and, if such purpose is inextricably mixed up with the other purposes of the trust, is void altogether. But where the substantial purpose of the trust may be achieved without violating the law, any illegal means prescribed for the attainment of such purpose may be disregarded, and the trust will be valid ('mere machinery').

Re Daveron [1893] 3 Ch. 421.
Re Appleby [1903] 1 Ch. 565.
Re Coulson's Trusts (1908) 97 L. T. 754.

[? does the latter part of this rule apply to any defect other than a perpetuity. For the application of the Rule against Perpetuities to charitable trusts, see *ante*, Sect. XV, Tit. III, § 1734 (vi). It

should be noted, that a trust which in itself is free from illegality, is not made void by the fact that it was made from an illegal motive or for an illegal consideration (*Ayerst* v. *Jenkins* (1873) L. R. 18 Eq. 275). But see *Phillips* v. *Probyn* [1899] 1 Ch. 811, which seems difficult to reconcile with the earlier case.]

Property outside the jurisdiction

1774. The Court has power to enforce trusts against persons within its jurisdiction; even though the property subject to the trust is situated outside the jurisdiction.[a] But the Court cannot directly affect or control immovables outside the jurisdiction;[b] and it will not, as a rule, adjudicate on questions relating to the title or right to the possession of immovable property out of the jurisdiction, unless there exists between the parties to the action some personal relation arising out of contract or implied contract, fiduciary relationship, or fraud.[c]

(a) *Penn* v. *Lord Baltimore* (1750) 1 Ves. Sen. 444 (land).
Ewing v. *Orr-Ewing* (1885) L. R. 10 App. Ca. 453 (personalty).
Re Smith [1913] 2 Ch. 216 (land).
(b) *Re Piercy* [1895] 1 Ch. 83.
(c) *Deschamps* v. *Miller* [1908] 1 Ch., at p. 863, *per* Parker, J.

TITLE II — APPOINTMENT AND REMOVAL OF TRUSTEES

Who may be a trustee

1775. Any person, corporate[a] or individual, including a minor,[b] a married woman,[c] a bankrupt,[d] and a convict,[e] is capable of being a trustee; but no one can be compelled to become a trustee against his will.[f]

(a) *Re Thompson's Settlement* [1904] W. N. 205.

[The most conspicuous example of a corporate trustee is, of course, the Public Trustee appointed under the Public Trustee Act, 1906.]

(b) But a minor's powers as a trustee are restricted by the fact that he cannot (with certain exceptions) make a binding conveyance of land (*ante*, Sect. VII, Tit. I, § 1497). This defect may be cured by means of vesting orders under s. 26 (ii) of the Trustee Act, 1893; or a new trustee may be appointed by the Court, under s. 25 of that Act.

(c) Married Women's Property Act, 1907, s. 1 (1). And her husband is not liable for her breach of trust, unless he has acted in the trust (M. W. P. Act, 1882, s. 24).

(d) It is expressly provided by the Bankruptcy Act, 1883 (s. 44 (1)), that the property held by a bankrupt as trustee shall not be divisible among his creditors. But a bankrupt and a felon trustee may be removed by the Court under s. 25 of the Trustee Act, 1893.

(e) *Ibid.*, s. 48.

[A lunatic trustee may also be removed by the Court, and a vesting order made, transferring the property (Lunacy Act, 1911, s. 1).]

(f) *Re Ridley* [1904 2 Ch., at p. 774.
Re Benett [1906] 1 Ch. 216.

[The rule applies; even where the trust estates pass to the personal representatives of a trustee under s. 30 of the Conveyancing Act, 1881. The representatives, though they are owners of the trust property, are not trustees; but, until the appointment of new

trustees, they can exercise the powers of the deceased (Conveyancing Act, 1911, s. 8), and they may take under a gift to 'the trustees for the time being' of the settlement (*Re Waidanis* [1908] 1 Ch. 123). A person who wrongfully intermeddles with trust property is called a 'trustee *de son tort*.' He incurs the liabilities, but has not the rights, of a trustee (*Re Barney* [1892] 2 Ch. 265).]

Appointment of trustee

1776. A trustee may be appointed: —

(i) by the settlor in the settlement creating the trust;

[This is the normal method of original appointment, and must, probably, observe the rules specified in § 1768, *ante*.]

(ii) by the person nominated for the purpose by the settlement (*post*, § 1777);

Trustee Act, 1893, s. 10 (1).

[Unless the settlement otherwise provides, this power cannot, of course, be exercised, except to supply a vacancy among the trustees. But, if the wording of the power is not inconsistent, the donee of the power may appoint himself (*Montefiore* v. *Guedalla* [1903] 2 Ch. 723).]

(iii) if there is no such person, or no such person able or willing to act, then, subject to the terms of the settlement, by the surviving or continuing trustee or trustees, or, if there is no such person, by the personal representatives of the last surviving or continuing trustee;

Ibid.

[The appointment under this provision must be in writing (*ibid.*). The representative of a last surviving trustee cannot appoint himself a trustee under this provision (*Re Sampson* [1906] 1 Ch. 435). *Quære:* is this decision affected by s. 8 (1) of the Conveyancing Act, 1911?]

(iv) by the Court, whenever it is expedient to appoint a new trustee or trustees, and it is found inexpedient, difficult, or impracticable, to do so without the assistance of the Court.

Trustee Act, 1893, s. 25 (1).

[This section is particularly applicable in the case of bankrupt and convict trustees (*ante*, § 1775 n. (d)). But the Court will not exercise its powers if there is any other person able and willing to act (*Re Higginbotham* [1892] 3 Ch. 132; *Re Firth* [1912] 1 Ch. 806).]

Discharge of trustee

1777. Where a trustee, whether original or substituted, and whether appointed by the Court or otherwise, remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act, or is incapable of acting, therein, the person or persons having under the instrument creating the trust power to appoint new trustees, or, failing them, the persons specified in § 1776 (iii) *ante*, may, by writing, appoint another trustee in his place.[a] Subject to this provision, a trustee can only be removed by the order of the Court.[b]

(a) Trustee Act, 1893, s. 10 (1).

(b) Even the Court cannot remove a trustee who desires to continue in office; except for good reasons (*Re Blanchart* (1861) 3 De G. F. & J. 131).

[It will be noticed that even this statutory provision does not formally authorize the removal of a trustee; though, doubtless, the appointment of a substitute has substantially that effect.]

Retirement of trustee

1778. Generally speaking, a trustee may not retire without the leave of the Court; except in pursuance of a power in the settlement, or with the consent of all persons interested in the settlement, being of full age and capacity.[a] But, subject to the terms of the instrument, if any, creating the trust, where there are more than two trustees, or where the Public Trustee is acting as a trustee of the settlement,[b] if a trustee by deed declares that he is desirous of being discharged from the trust, and if his co-trustees or trustee, and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of such trustee, and to the vesting in the co-trustee alone of the trust property, the trustee desirous of being discharged will be deemed to have retired from the trust, and will by the deed be discharged therefrom.[c]

(a) *Wilkinson* v. *Parry* (1828) 4 Russ. 272.

[But, apparently, the Court will make the order as of course, on being satisfied that the trustee's accounts are in order; though, in the event of the trustee having acted capriciously, he will be ordered to pay the costs of the application (*Forshaw* v. *Higginson* (1855) 20 Beav. 485). And it is not always necessary to appoint a new trustee in place of the retiring trustee (*Re Chetwynd's Settlement* [1902] 1 Ch. 692).]

(b) Public Trustee Act, 1906, s. 5 (2).
(c) Trustee Act, 1893, s. 11.

Not less than two trustees

1779. Where new trustees are appointed under § 1776 (ii) and (iii) *ante*, the number of trustees

must not be allowed to fall below two; unless only one trustee was originally appointed,[a] or unless the settlement authorizes the acting of a sole trustee,[b] or unless the Public Trustee is acting as a trustee of the settlement.[c]

(a) Trustee Act, 1893, s. 10 (2) (c).
(b) *Ibid.*, s. 10 (5).
(c) Public Trustee Act, 1906, s. 6 (1).

[But the Public Trustee must not be appointed a trustee by any one but the settlor without an order of the Court, if the settlement contains a direction to the contrary (*ibid.*, s. 5 (3)); and, even where there is no such direction, the Court may, on the application of a beneficiary, prohibit the appointment of the Public Trustee (*ibid.* (4)). Generally speaking, the *onus* is on the party proposing the appointment of the Public Trustee (*Re Hope Johnstone* (1909) XXV T. L. R. 369, *per* Parker, J.; *Re Firth* [1912] 1 Ch. 806). And notice must be given to all parties beneficially interested of any proposal to make such an appointment (Public Trustee Act, 1906, s. 5 (4)).]

Judicial trustee

1780. The Court may, on application by a settlor or intending settlor, or by any trustee or beneficiary, in its discretion appoint a judicial trustee, either as a sole or joint trustee, and, if sufficient cause is shown, in place of all or any existing trustees. Such person may be either a fit and proper person nominated in the application, or, in the absence of such nomination, or if the Court is not satisfied with the fitness of the person so nominated, an official of the Court.[1] In either case, the judicial trustee will be subject to the control and supervision of the Court, which may give him any general or special direction in regard to the

trust or the administration thereof.[b] The Public Trustee may be appointed a judicial trustee under this §.[c]

(a) Judicial Trustees Act, 1896, s. 1 (1).
(b) *Ibid.* (3) (4).
(c) Public Trustee Act, 1906, s. 2 (1) (*a*).

[A retiring judicial trustee has no power to appoint a successor under s. 10 of the Trustee Act, 1893 (*Re Johnston* [1911] W. N. 234).]

To carry out settlement and exercise diligence

1781. It is the duty of a trustee to administer the trust property in accordance with the directions of the settlement; [a] and, in so far as the settlement is silent, according to the standard of diligence and discretion approved by the Court for the conduct of trustees.[b]

(a) *Parkes* v. *Royal Botanic Society* (1908) XXIV T. L. R. 508.
Cross v. *Lloyd-Graeme* (1910) 102 L. T. 163.
Re Whiteley (1911) 55 Sol. Jo. 291.

[Only in cases of obvious necessity, and to carry out the settlor's substantial wishes, will the Court sanction a departure from the terms of the settlement (*Re New* [1901] 2 Ch. 534 — described by Cozens-Hardy, L. J., in *Re Tollemache* [1903] 1 Ch., at p. 956, as the 'high water mark of . . . extraordinary jurisdiction'). Even in the case of charitable trusts, there can be no application of the doctrine of *cy-près*, so long as any possibility of carrying out the settlor's directions remains (*Weir Hospital Case* [1901] 2 Ch. 124). But, where the general intent of the settlor is clear, and the precise means prescribed by him to give effect to it are impossible of execution, the Court may, in the case of charitable trusts, adopt a *cy-près* scheme (*Biscoe* v. *Jackson* (1887) 35 Ch. D. 460; *Re Davis* [1902] 1 Ch. 876). Where, however, there is a devise or bequest to a specific and then existing charitable institution, which comes to an end before the testator's death, the ordinary rule of lapse applies; and the gift fails (*Re Ovey* (1885) 29 Ch. D. 560; *Re Rymer* [1895] 1 Ch. 19).]

(b) *Speight* v. *Gaunt* (1883) L. R. 9 App. Ca. 1.
Learoyd v. *Whiteley* (1887) L. R. 12 App. Ca. 727.

[The standard of diligence required of a trustee is very difficult to define. One of the best-known attempts is that of Lord Blackburn, in *Speight* v. *Gaunt*, *ubi sup.*, at p. 19, who describes it as that 'of an ordinary prudent man of business . . . in managing similar

affairs of his own' — a definition substantially adopted by Lord Watson in *Learoyd* v. *Whiteley*, *ubi sup.*, at p. 733. But, surely, a prudent man of business may, in certain circumstances, justifiably take risks in his own affairs, e. g. leave a debt on personal security, which no trustee, without express authority, would be justified in doing. See remarks of Lindley, L. J., in *Whiteley* v. *Learoyd* (1886) 33 Ch. D., at p. 355.]

To exercise discretion

1782. In such administration, the trustee must act upon his own discretion; neither, in the absence of special circumstances, throwing the burden on the Court,[a] nor delegating it to agents.[b]

(a) *Perrins* v. *Bellamy* [1899] 1 Ch., at pp. 801–2, *per* Romer, L. J.

[Where a proper case exists, the trustees may either pay the trust fund into Court under s. 42 of the Trustee Act, 1893, or apply for the directions of the Court under O. LV, r. 3. The latter is the preferable course (*Re Giles* (1886) 34 W. R. 712). But even this must not be resorted to, at the expense of the estate, without good cause (*Perrins* v. *Bellamy*, *ubi sup.*); and this form of procedure is not suitable for the settlement of questions involving charges of fraud or wilful default (*Dowse* v. *Gorton* [1891] A. C., at p. 202) or even disputed facts (*Nutter* v. *Holland* [1894] 3 Ch. 408). Moreover it can only be employed in the cases of trusts arising under a deed or instrument.]

(b) *Learoyd* v. *Whiteley*, *ubi sup.*, at p. 732.
Davis v. *Hutchings* [1907] 1 Ch. 356.

[The trustee is, of course, entitled to expert advice in cases of difficulty; but the decision must be his own. He is entitled, where it is practically impossible for him to act in person, to delegate a purely ministerial act to a proper agent (*Speight* v. *Gaunt*, *ubi sup.*).]

Not responsible in certain cases

1783. Subject to § 1782, a trustee is not responsible for the default of —

(i) a solicitor whom he has appointed to

receive money or other valuable consideration by permitting him to have the custody of a title-deed containing a receipt effectual under the Conveyancing Act, 1881, s. 56;

Trustee Act, 1893, s. 17 (1).
Re Sheppard [1911] 1 Ch. 50.

(ii) a banker or a solicitor whom he has appointed to receive moneys payable under a policy of insurance, by permitting him to have the custody of the policy with a receipt by the trustee;

Trustee Act, 1893, s. 17 (2).

unless, in either case, he leaves the money for an unreasonable time in the hands of such solicitor or banker, after he is aware of its receipt by him.

Re Sheppard, ubi sup.

General provision

1784. Subject to the terms of the instrument, if any, creating the trust, a trustee is liable only for money and securities actually received by him; notwithstanding that he has signed any receipt for the sake of conformity. And he is liable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency

of any securities, nor for any other loss; unless the same happens through his own wilful default.

Trustee Act, 1893, s. 24.

[Despite the apparent width of its terms, it is doubtful whether this provision (which reproduces a similar provision in the Law of Property Amendment Act, 1859 (s. 31)) has really altered the law (*Re Brier* (1882) 26 Ch. D., at p. 238, *per* Lord Selborne, C.). A trustee has never been liable for the default of other persons; except in so far as his own default has contributed to it. But the section may be studied as a useful contribution towards the solution of the difficult question of the standard of diligence required of a trustee.]

To realize outstanding property

1785. It is the duty of a trustee, subject to the terms of the settlement, to get in immediately all outstanding claims of the trust estate, and all such parts of the estate as may not be invested in authorized investments,[a] and to invest all such parts of the estate as are not already so invested, in authorized investments. For the purposes of this Title, 'authorized investments' means investments authorized by the settlement, or the investments described or referred to in section 1 of the Trustee Act, 1893.[b] But, when exercising his statutory power of investment, the trustee must observe the conditions specified in sections 2 and 7 of the said Act,[c] and must act in the exercise of his discretion, and subject to any consent required by the instrument, if any, creating the trust.[d]

(a) *McGachen* v. *Dew* (1851) 15 Beav. 84.

[It does not necessarily follow that the trustees must immediately call in all investments made by the settlor himself which they would

not themselves be justified in making (*Re Chapman* [1896] 2 Ch., at p. 782). On the other hand, a direction in the settlement to invest in non-trustee securities does not prevent the trustee investing in trustee securities (*Re Burke* [1908] 2 Ch. 248); unless it is clearly exclusive (*Ovey* v. *Ovey* [1900] 2 Ch. 524).]

(b) This enactment sets out a considerable number of permitted investments, and ends by including 'any of the stocks, funds, or securities for the time being authorized for the investment of cash under the control or subject to the order of the High Court.' These securities will be found enumerated in R. S. C., O. XXII, r. 17.

(c) These conditions forbid the purchase of certain redeemable stock within fifteen years of the date fixed for redemption, at a price higher than its redemption value, or at any earlier date at more than 15 *per cent.* above its redemption value (s. 2). They also forbid the trustees to hold certificates to bearer of certain stocks (s. 7).

(d) Trustee Act, 1893, s. 3.

Continuing authorized securities

1786. A trustee is not liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the instrument of trust or the law.

Trustee Act, 1894, s. 4.

Investing on real security

1787. Subject to the terms of the instrument creating the trust, a trustee who has power to invest in real securities may invest on mortgage, not only of freehold and copyhold, but of property (sc. land) held for an unexpired term of not less than two hundred years, and not subject to a reservation of a rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for

non-payment of rent, and on any charge, or upon any mortgage of any charge, made under the Improvement of Land Act, 1864.[a] In the absence of express words, a power to invest in real securities does not authorize the trustee to purchase land.[b]

(a) Trustee Act, 1893, s. 5 (1).
(b) *Re Mordan* [1905] 1 Ch. 515.

[It must be admitted that the judicial authority for the last proposition is hard to discover; but the opinions of text-book writers appear to be uniform; and the proposition seems to be a fair inference from the terms of the section referred to in the first part of the §. In *Re Mordan*, though the special words of the settlement were held to authorize a purchase, the truth of the general rule was not denied.]

Precautions in lending trust money

1788. A trustee who lends money on any property on which he can lawfully lend, is not chargeable with breach of trust merely on the ground of the insufficiency of the security at the time when the loan was made, if he acted on a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, and on the advice of such surveyor or valuer expressed in the report, and did not lend more than two-thirds of the value of the property as stated in such report.[a] And if, in such circumstances, he advances more than such proportion on a mortgage security in other respects proper, he is only liable for the loss of the excess.[b]

(a) Trustee Act, 1893, s. 8 (1).

[The mere fact that the valuer has previously acted for the mortgagor is not necessarily an objection (*Re Solomon* [1912] Ch. 261).]

(b) Trustee Act, 1893, s. 9.

[The two-thirds standard is a minimum, not to be blindly followed (*Shaw* v. *Cates* [1909] 1 Ch. 389). But there is no absolute rule that only one half should be lent on business premises (*Palmer* v. *Emerson* [1911] 1 Ch. 758).]

Dispensing with full title

1789. A trustee is not chargeable with breach of trust merely for dispensing, wholly or partially, with the investigation of the lessor's title in lending on the security of leasehold property; or, in purchasing or lending on any property, for accepting a shorter title than a purchaser under an open contract is entitled to require, if, in the opinion of the Court, the title he accepted was one which a person acting with prudence and caution would have accepted.

Trustee Act, 1893, s. 8 (2) (3).

Acting under power of attorney

1790. A trustee acting or paying money in good faith under a power of attorney is not liable for any such act or payment by reason of the fact that, unknown to the trustee, the maker of the power of attorney was dead, or had done some act to avoid the power, when the trustee did the act or made the payment.

Trustee Act, 1893, s. 23.

[For the wider protection given by the Conveyancing Acts to persons acting on powers of attorney, see *ante*, Bk. I, Sect. III, Tit. IV, § 141.]

Apportionment of charges between capital and income

1791. A trustee, under whose trust the income of the trust fund is payable to certain persons and the capital to others, must carefully apportion charges and expenses between income and capital. The following charges or expenses fall, subject to the terms of the settlement, upon income: —

(i) rent of leasehold property held as part of the trust fund;

Re Betty [1899] 1 Ch. 821.

(ii) repairs to similar property actually required by the lease to be made,[a] but not merely voluntary repairs which the trustees are not legally bound to make.[b]

(a) *Re Gjers* [1899] 2 Ch. 54.
Re Sutton (1912) 56 Sol. Jo. 650.
(b) *Re Freman* [1898] 1 Ch. 28.
Re Sutton, ubi sup.

[The tenant for life under a testament is not chargeable with arrears of rent or repairs due at the testator's death; but only with current charges (*Re Courtier* (1886) 34 Ch. D. 136, followed in *Re Sutton, ubi sup.*).]

(iii) fire insurance premiums up to three-fourths of the value of insurable property, other than property which the trustee is bound to convey absolutely to any beneficiary on request;

Trustee Act, 1893, s. 18.

[The position of fire insurance is peculiar. The old rule was, that a trustee was not bound to insure (*Fry* v. *Fry* (1859) 27 Beav. 144); and the section just quoted is merely enabling. Consequently, it would seem that it still rests with the trustees (except in the case of leasehold property where the lease requires it) to refuse to insure (*Re McEacharn* (1911) 103 L. T. 900). If the tenant

for life himself insures, he has no claim against the estate for premiums (*Re Winchilsea's Trusts* (1888) 39 Ch. D. 168. On the other hand, he can take the whole of the insurance money (*Warwicker* v. *Bretnall* (1882) 23 Ch. D. 188); unless the remainderman can claim to have the premises rebuilt under s. 83 of the Fires Prevention Act, 1774 (*Re Quicke's Trusts* [1908] 1 Ch. 887).]

(iv) rates and local government charges generally, except such as are specifically incurred for the permanent improvement of the property.

Re Crawley (1885) 28 Ch. D. 431.
Re Barney [1894] 3 Ch. 562.
Re Farnham [1904] 2 Ch. 561.
Re Smith [1906] 1 Ch. 799.

But legal costs, charges, and expenses (unless exclusively incurred for the benefit of the persons entitled to the income), are payable out of capital.

Re McClure's Settlement (1906) 76 L. J., Ch. 52.

[Of course, as between the trustees who incur them and the beneficiaries, costs and other outgoings are a charge on both capital and income (*Stott* v. *Milne* (1884) 25 Ch. D., at p. 715, *per* Selborne, C.).]

Wasting and reversionary securities

1792. When a testator has bequeathed the residue of his personal estate upon trust to pay the income to a certain person or certain persons for life (? or other limited period) and the capital to certain other persons thereafter, the trustee must, unless the testator has otherwise expressly or by implication directed,[a] pending the conversion into duly authorized investments (*ante*, § 1785) of any wasting or reversionary securities,[b] pay to the person or persons en-

titled to the income, not the actual annual produce of such wasting or reversionary securities, but a sum equal to three *per cent. per annum* on the income which would have been produced if the securities in question had been converted into proper investments at the testator's death or the expiry of one year therefrom.[c] This rule has no application to trusts created by settlement *inter vivos*,[d] or to devises of realty.[e]

(a) *Collins* v. *Collins* (1833) 2 My. & K. 703.

[A mere power to postpone realization is not, in itself, a contrary direction (*Re Chaytor* [1905] 1 Ch. 233); nor is a gift of the 'rents, issues, and profits' to the tenant for life (*Re Wareham*) [1912] 2 Ch. 312).]

(b) It seems to be the better opinion, though the point is not clear, that an actual power to retain wasting securities, excludes the rule — i. e. that the rule only applies to unauthorized wasting securities (See remarks of Kekewich, J., in *Re Bates* [1907] 1 Ch. at pp. 28, 29, and of Warrington, J., in *Re Nicholson* [1909] 2 Ch., at p. 120). But the former case, and *Re Wilson* [1907] 1 Ch. 394, were cases of hazardous, not wasting, securities. If a power is given to retain securities which would otherwise be manifestly improper, it can only be exercised with the concurrence of all the trustees *Re Hilton* [1909] 2 Ch. 548.

(c) *Howe* v. *E. of Dartmouth* (1802) 7 Ves. 137.
Brown v. *Gellatly* (1867) L. R. 2 Ch. App. 751.
Macdonald v. *Irvine* (1878) 8 Ch. D. 101.
Re Earl of Chesterfield (1883) 24 Ch. D. 643.
Rowlls v. *Bebb* [1900] 2 Ch. 107.

[Where there is no express direction to convert, the valuation is at a year from the death; where there is, at death or the period (if any) fixed by the testator for realization (*Brown* v. *Gellatly*, *ubi sup.*). Sometimes the Court, in carrying out this rule, has allowed 3 (formerly 4) *per cent.* on the estimated value of the security at the proper period of conversion; at others, the income calculated upon an imaginary investment in consols at that date.]

(d) *Re Van Straubenzee* [1901] 2 Ch. 779.

(e) *Re Darnley* [1907] 1 Ch. 159.
Re Oliver [1908] 2 Ch. 74.

Unauthorized securities

1793. (*Semble*) The rule laid down in § 1792 applies to unauthorized as well as to wasting and reversionary securities;[a] but an express power to retain indefinitely all or any of the testator's investments, with a direction to pay the income of the entire estate to the tenant for life, prevents the application of the rule to such investments.[b]

(a) *Dimes* v. *Scott* (1827) 4 Russ. 195.
Brown v. *Gellatly* (1867) L. R. 2 Ch. App., at p. 759.
(b) *Re Bates* (1907) 1 Ch. 22.
Re Wilson, *ibid.*, 394.

[But see *Re Lynch-Blosse* [1899] W. N. 27.]

Liability of trustee for improper investments

1794. In the event of a trustee failing altogether to invest, he will be liable to pay to the beneficiaries interest at the rate of four *per cent. per annum* on the uninvested sum, until it is properly invested.[a] If he invests injudiciously in authorized securities, he will be liable for the loss sustained by the beneficiaries.[b] If he invests in unauthorized securities, the beneficiaries may (being of full age and capacity) either accept the investment, or reject it and charge the trustee with the money actually invested, and interest at the rate of four *per cent. per annum* from the date of the investment.[c]

(a) *Robinson* v. *Robinson* (1851) 1 De G. M. & G., at p. 255, *per* Cranworth, L. J.
(b) *Re Salmon* (1889) 42 Ch. D. 351.
Re Turner [1897] 1 Ch. 536.
(c) *Re Barclay* [1899] 1 Ch. 674.

[The non-penal rate of interest chargeable against a trustee is now four *per cent.*, not three (*Re Davy* [1908] 1 Ch. 61). If the beneficiaries reject the investment, they have no claim under the rule set out in § 1792 (*Slade* v. *Chaine* [1908] 1 Ch. 522). If they accept an unauthorized investment, it would seem that, on principle, they could not claim in respect of ultimate loss. But they have been allowed to prove such a claim in the bankruptcy of the trustee (*Re Lake* [1903] 1 K. B. 439).]

Trustee's accounts

1795. A trustee must be prepared to render, at all reasonable times, full accounts of his dealings with the trust property, and to give full information as to the condition of the trust, to all persons interested under the trust;[a] and he will be charged personally with the costs of any proceedings which may be rendered necessary to compel the production of such accounts or information.[b]

(a) Even persons only contingently interested are entitled to information (*Re Skinner* [1904] 1 Ch. 289).

(b) *Pearse* v. *Green* (1819) 1 J. & W. 140, *per* Lord Eldon, C. *Re Tillott* [1892] 1 Ch. 86.

[Any trustee or beneficiary may now insist on having the accounts of the trust audited not oftener than once a year by a solicitor or accountant agreed between the parties or appointed by the Public Trustee (Public Trustee Act, 1906, s. 13; *Re Oddy* [1911] 1 Ch. 532; *Re Utley* (1912) 56 Sol. Jo. 518). The accounts of a judicial trustee (*ante*, Tit. II, § 1780) are audited once a year (Judicial Trustees Act, 1896, s. 1 (6)).]

No profit by trustee

1796. A trustee must not make any personal profit out of the trust; except so far as he is expressly authorized to do so by the settlement.

Keech v. *Sandford* (1726) Sel. Ca. in Ch. 61.
Re Sykes [1909] 2 Ch. 241.

In particular, he must not: —

(i) renew for his own benefit a lease belonging to the trust;

Keech v. *Sandford, ubi sup.*

[A trustee is now bound, on request of any beneficiary interested, and in his own discretion if no such request is made, entitled, to use his best endeavours to renew a lease of renewable leaseholds for the benefit of the trust; unless there is a person in possession entitled to enjoy the leaseholds without liability to renew or contribute to the cost of renewal, and his written consent cannot be obtained (Trustee Act, 1893, s. 19 (1)).]

(ii) speculate or deal with the trust property with a view to personal gain;

Rochefoucauld v. *Boustead* [1898] 1 Ch. 551.
Re Davis [1902] 2 Ch., at p. 317.

[And if he does, the beneficiaries may claim either all the profit, or the return of the money employed with interest at the penal rate of five *per cent.* The severity of the rule is best realized from the fact that, in *Rochefoucauld* v. *Boustead*, *ubi sup.*, the trustee was charged with a sum borrowed by him on the security of the trust property; notwithstanding that no resort was made to the property by the lender.]

(iii) charge commission or profit costs for professional or other services;

Matthieson v. *Clarke* (1854) 3 Drew. 3.
Re Chalinder and Herington [1907] 1 Ch. 58.

[The disability extends to costs paid by third parties, which must be received and carried to the credit of the trust fund (*Re Corsellis* (1887) 34 Ch. D. 675); and the ordinary authority in a settlement only covers strictly professional charges (*Re Chalinder and Herington*, *ubi sup.*). But the disability does not extend to the trustee's partner; and, if the partnership articles *bonâ fide* provide that all profit costs shall in such cases go to the partners, the firm may receive them (*Clack* v. *Carlon* (1861) 30 L. J. Ch. 639; *Re Doody* [1893] 1 Ch. 129). Moreover, a solicitor who acts for himself and co-trustee in litigation, the costs not being thereby increased, is entitled

to profit costs (*Cradock* v. *Piper* (1850) 1 Mac. & G. 664). A rule which used to forbid the charging of profit costs by solicitor-mortgagees has now been abolished by the Mortgagees' Legal Costs Act, 1895.]

(iv) purchase the trust property from himself without the leave of the Court.

Fox v. *Mackreth* (1788) 2 Bro. C. C. 400; 4 Bro. P. C. 258.
Farmer v. *Dean* (1863) 32 Beav. 627.
Williams v. *Scott* [1900] A. C., at p. 503.

[There is no absolute rule against a trustee purchasing the interest of a beneficiary. But the transaction leaves upon the trustee the *onus* of proving its fairness (*Ex parte Lacey* (1802) 6 Ves. 625); though, if the beneficiaries reclaim the property, they are not entitled to interest on the rents or profits (*Silkstone Co.* v. *Edey* [1900] 1 Ch. 167). A former trustee, who has *bonâ fide* retired from the trust, may purchase the trust property (*Boles and British Land Co.* [1902] 1 Ch. 244). It is sometimes said that the rule in the sub-s. does not apply to 'bare trustees' — i. e. trustees with no active duties to perform.]

Any profit which may accrue from the dealings of the trustee with the trust fund accrues to the fund.

Keech v. *Sandford, ubi sup.*

[The rule that a trustee must not make any unauthorized personal profit out of his position has been extended to persons who are not strictly trustees, e. g. tenants for life (*Griffith* v. *Owen* [1907] 1 Ch. 195), partners (*Bevan* v. *Webb* [1905] 1 Ch. 620), and agents (*Andrew* v. *Ramsay* [1903] 2 K. B. 635). But the rule must not be pushed so as to include remote profits (*Re Lewis* (1910) 103 L. T. 495), or remote relationships (*Re Biss* [1903] 2 Ch. 40). The Public Trustee is, and a judicial trustee may be, entitled to remuneration for his services (Public Trustee Act, 1906, s. 8 (1); Judicial Trustees Act, 1896, s. 1 (5)).]

TITLE IV — POWERS OF TRUSTEES

[*NOTE* — The powers described in this Title are independent of, and in addition to, any statutory overriding powers which trustees may exercise in virtue of the provisions described in Section VI, Title II, and Section VII, Title I, § 1504, *ante*.]

Disposition of trust property

1797. Apart from express provision in the settlement, and subject to Tit. III, §§ 1785, 1792, *ante*, a trustee has, as such, no power to sell,[a] lease,[b] or mortgage[c] the trust property; except that: —

(i) where there is a devise of a testator's whole interest in real estate to trustees, charged with the payment of debts or legacies, or other specific sum or sums, the trustees may, in the absence of express provision for raising such sum or sums, sell or mortgage the land for the purpose of raising such sum or sums;[d]

(ii) where a settlement of property as personal estate contains a power to invest money in purchase of land, such land will, unless the settlement otherwise provides, be held by the trustees on trust for sale, with power to postpone the sale;[e]

(iii) (*semble*) trustees may let land on a yearly tenancy, or for a short period, if such a step is necessary or desirable in the interests of the trust;[f]

(iv) where a trustee properly exercises his duty or power to obtain a renewal of renewable leaseholds (*ante*, Tit. III, § 1796 (i) n.), he may, if he has not in his hands sufficient money for the purpose, raise the money required to effect such renewal, by mortgage of the hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the same user or trusts.[g]

(a) *Perrins* v. *Bellamy* [1899] 1 Ch. 797.
(b) *Bowes* v. *E. London Waterworks* (1818) 3 Madd. 375; affd. Jac. 324.
(c) *Walker* v. *Southall* (1887) 56 L. T. 882.
Sheffield &c. Bdg. Soc. v. *Aizlewood* (1889) 44 Ch. D. 412.
(d) Law of Property Amendment Act, 1859, ss. 14, 15.

[This power has now become almost obsolete; owing to the change in the law made by s. 1 of the Land Transfer Act, 1897, under which the personal representatives of the testator can sell to pay debts and legacies. But it may still be useful in the case of deaths between 1859 and 1898.]

(e) Conveyancing Act, 1911, s. 10.
(f) *Naylor* v. *Arnitt* (1830) 1 Russ. & M. 501.
(g) Trustee Act, 1893, s. 19 (2).

[It cannot be doubted that, if the trustee is legal owner, a *bonâ fide* purchaser from him would get an unimpeachable title (*Bowes* v. *London E. W. Works*, *ubi sup.*, in Jac., at p. 330, *per* Lord Eldon, C., and see *ante*, Sect. I, Tit. XI, § 1313). And it must be admitted, that there is little express authority for the rule in the text as regards pure personalty. But the general principle stated in the text seems to be accepted as law.]

1798. Where a trustee has a trust for or power of sale, he may (subject to the provisions of the settle- *Mode of sale*

ment) sell or concur in selling any part of the property, whether subject to prior charges or not, either together or in lots, by public auction or private contract, subject to any conditions respecting title or evidence of title, or other matter, as he thinks fit, with power to vary any contract for sale and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss. This § only applies to trusts or powers created by settlements coming into operation after 1881.

Trustee Act, 1893, s. 13.

Depreciatory conditions

1799. No sale made by a trustee can be impeached by a purchaser, in any case, on the ground that the conditions of sale were unnecessarily depreciatory; nor by a beneficiary, unless it appears that the alleged depreciatory character rendered the consideration for the sale inadequate. And no such sale can be impeached on such ground against the purchaser, after the execution of the conveyance; unless it is shown that he was acting in collusion with the trustee when the contract for sale was made.

Ibid., s. 14.

Minerals

1800. A trustee having for the time being a power to dispose of land, may, with the sanction of the Court, dispose of the land with an exception or reservation of any minerals, and with or without

rights and powers of or incidental to the working, getting, or carrying away of the minerals, or so dispose of the minerals, with or without the said rights or powers, separately from the residue of the land.

Trustee Act, 1893, s. 44 (1).

[The sanction, once given, operates to authorize future dispositions of 'such' land or minerals (? all the other land or minerals comprised in the settlement). But this further authority is subject to the terms of the settlement (*ibid.*, s. 44 (2)).]

Vendor and purchaser and Conveyancing Acts

1801. A trustee who is either a vendor or a purchaser may sell or buy without excluding the application of section 2 of the Vendor and Purchaser Act, 1874;[a] and a trustee, whether acting by himself or through a solicitor, will not be deemed guilty of neglect or breach of duty, or become in any way liable, by reason of his omitting, in good faith, in any instrument, or in connection with any contract for sale or other transaction, to negative the giving, inclusion, implication, or application, of any of the powers, covenants, provisions, stipulations, or words, given, or deemed to be included or implied in any such instrument, or made applicable to any such transaction, by the Conveyancing Act, 1881.[b]

(a) *Ibid.*, s. 15.
(b) Conveyancing Act, 1881, s. 66.

[For the wider immunities of a trustee purchasing or lending on property generally, see *ante*, Tit. III, §§ 1787–1790. The provisions of the Vendor and Purchaser Act, s. 2, are too long to set out. They comprise various conveyancing rules for the completion of an

open contract for the sale of land. The provisions of the Conveyancing Act, 1881, to which reference is made, are also very numerous, and can only be appreciated by a perusal of the Act.]

Infant's land

1802. Where a person beneficially entitled to the possession of land is a minor, the trustees described in Sect. VII, Tit. I, § 1505, *ante*, have power to manage the land and do such acts as are specified in that §.

Conveyancing Act, 1881, s. 42.
Conveyancing Act, 1911, s. 14.

Repairs

1803. Subject to § 1802, and to any directions in the settlement, a trustee has no power to lay out money at the expense of the beneficiaries in effecting repairs not necessary for the preservation of the property from forfeiture or destruction. Where repairs are necessary, the trustees must apply to the Court to apportion the cost of the repairs amongst the beneficial interests.

Re De Teissier [1893] 1 Ch. 153.
Re Willis [1902] 1 Ch. 15.
Re Legh [1902] 2 Ch. 274.
Re Garnham [1904] 2 Ch. 561.

[On the other hand, North, J., in the case of *Re Freman* [1898] 1 Ch. 28, seems to have assumed that the trustees had power, at any rate with the approval of the Court, to do repairs described as 'necessary' (generally). And, in the still earlier case of *Re Hotchkys* (1886) 32 Ch. D. 408, Lindley, L. J. (at p. 420) suggested that, if it was 'judicious' to make repairs, the Court would authorize them. But these views are somewhat at variance with the expressions of the Court in the later cases. It has been previously pointed out (Tit. III, § 1791 (ii)) that the cost of repairs which the owner

of the property is legally liable to perform (e. g. those required by the covenants of a lease under which the property is held) fall upon income.]

Insurance

1804. A trustee may, subject to the terms of the settlement, insure any insurable property against loss or damage by fire to an amount (including any insurance already on foot) not exceeding three-fourths of its full value, and pay the premiums thereof out of the income of such property or of any other property subject to the same trusts, without obtaining the consent of the person or persons entitled to such income. This power does not apply to property which the trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

Trustee Act, 1893, s. 18.

[The position of a trustee in respect of *liability* to insure against fire has been previously noted (see *ante*, Tit. III, § 1791 (iii)).]

Appointment of agents to receive money

1805. Subject to the express provisions of the settlement, a trustee may appoint a solicitor as his agent to receive money or other valuable consideration under the trust, by permitting him to have the custody of, and produce, a deed containing a receipt which would, under the provisions of section 56 of the Conveyancing Act, 1881, justify the person paying or transferring such money or valuable consideration, in handing it over to the solicitor of an ordinary

vendor; and such person will be justified in handing it to such solicitor. And a trustee may appoint a banker or a solicitor to receive and give a discharge for money payable to the trustee under a policy of assurance, by permitting him to have the custody of the policy with a receipt signed by the trustee.

Trustee Act, 1893, s. 17.

[Apparently, this section abolishes the rule laid down by the Court of Appeal in *Bellamy* v. *Metropolitan Board of Works* (1883) 24 Ch. D. 387, and renders it unnecessary for the trustees, in the event of loss of the purchase money through the default of the solicitor, to prove special reasons for their action in allowing him to receive it.]

Receipts

1806. A trustee has power to give an effectual receipt in writing for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power; and such receipt will exonerate the person paying, transferring, or delivering the same (to him as trustee) from seeing to the application, or being answerable for any loss or misapplication, thereof.

Ibid, s. 20.

[Though the words in brackets are not in the Act, it has been held that the corresponding section (36) of the Conveyancing Act, 1881, does not protect a person who pays trust money to a trustee, not knowing him to be such (*Miller* v. *Douglas* (1886) 56 L. J. Ch. 91 — which was, however, a case of trustees who were also executors). Unlike a single executor, one of co-trustees cannot give a good discharge without the concurrence of his co-trustees (*Flower and Metropolitan Board of Works* (1884) 27 Ch. D. 592).]

Acceptance of composition

1807. Subject to the terms of the instrument (if any) creating the trust, two or more trustees acting together (or a sole acting trustee where, by the instrument creating the trust, a sole trustee is authorized to execute the trusts and powers thereof) may, if and as he or they may think fit, accept any composition or any security for any debt or any property claimed, and may allow time for payment of any debt, account, claim, or thing whatever relating to the trust, and for these purposes may execute such instruments and do such things as to them or him seem expedient, without being responsible for any loss occasioned by any act or thing so done in good faith.

Trustee Act, 1893, s. 21.

[This section has been, apparently, held to sanction even a compromise with defaulting trustees by their successors (*Re Sewell* [1909] 1 Ch. 806). But in doubtful cases the trustees ought to take the opinion of the Court (*Re Houghton* [1904] 1 Ch. 622).]

Income of infant's land

1808. Where trustees are in the possession of the land of a minor under the powers described in Sect. VII, Tit. I., § 1505, *ante*, they may, subject to the terms of the instrument under which the interest of the minor arises, apply at discretion any income arising from such land (including accumulations) for the minor's maintenance, education, or benefit, or pay thereout any money to his parent or guardian, to be applied for the same purposes. But this power

only exists where the instrument under which the minor's interest arises came into operation after 1881.

Conveyancing Act, 1881, s. 42 (4) (7) (8).
Conveyancing Act, 1911, s. 14.

[The surplus income is to be invested and (subject to the power of resort) accumulated for the benefit of the minor on his attaining twenty-one, or, if the minor is a woman and marries during minority, for her separate use on marriage (her receipt being a good discharge), or, if the minor dies during minority and (being a woman) unmarried, to be held upon the trusts of the settlement, or (where the minor has taken by inheritance or is entitled to the fee simple) for the benefit of his personal representatives (Act of 1881, s. 42 (5)).]

Advancement of infant's income

1809. Subject to the terms of the instrument under which the interest of the minor arises, when trustees hold any property in trust for a minor, either for life or any greater interest, and whether absolutely or contingently on his attaining-twenty-one [a] or on the occurrence of any previous event, the trustees may, at their sole discretion, pay to the minor's parent or guardian, or otherwise apply for or towards the minor's maintenance, education, or benefit,[b] the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the minor's maintenance or education, or not.[c]

(a) If the intervening income would not in any case belong to the minor, even though the contingency occurred (e. g. where there is a condition precedent to the vesting of an estate) the trustees cannot, as

a general rule, apply it under this power (*Re Dickson* (1883) 29 Ch. D. 331). But the Court may order maintenance, even out of such income, in the following cases of testamentary trusts — (*a*) where the testator stood *in loco parentis* towards the minor, and the contingency is the attainment of the latter's majority (*Re Abrahams* [1911] 1 Ch. 108), and no other provision is made by the testament for the minor (*Green* v. *Belchier* (1737) 1 Atk., at p. 507, *per* Lord Hardwicke, C.; *Re George* (1877) 5 Ch. D., at p. 843, *per* James, L. J.); (*b*) where the trust fund is a specific or merely deferred legacy, or, being a contingent legacy, is set apart from the testator's general estate by the testament (*Re Jeffery's Trusts* (1866) L. R. 2 Eq. 68; *Re Clements* [1894] 1 Ch. 665) — in the case of a *contingent* legacy, it is not enough that it should be merely specific (*Guthrie* v. *Walrond* (1883) 22 Ch. D. 573); (*c*) where the trust fund is residuary personalty (*Re Adams* [1893] 1 Ch. 329)); (*d*) where there is a direction to accumulate, followed by a gift of the accumulations for the benefit of the minor, whether for life or absolutely (*Re Collins* (1886) 32 Ch. D. 229; *Re Walker* [1901] 1 Ch. 879); (*e*) where there is a power to advance out of the capital of the fund (*Re Churchill* [1909] 2 Ch. 431). And it is possible that the trustees under s. 43 have power to do what the Court might do. In cases (*b*) and (*c*), the infant is, probably, entitled to the whole of the intervening income, as such, if he fulfils the contingency; in the other cases, there is, probably, merely a discretion to make an advancement for his benefit (*Re Bowlby* [1904] 2 Ch., at pp. 706–708, *per* Romer, L. J.).

(b) This power may be exercised, in the case of personalty, even after one member of a class entitled on majority attains majority (*Re Holford* [1894] 3 Ch. 30). But (*semble*) the old rule that, in the case of real estate, the member first attaining a vested interest is entitled to the whole income, is still unaffected (*Re Averil* [1898] 1 Ch. 523).

(c) Conveyancing Act, 1881, s. 43 (1).

[The residue of the income is to be accumulated and invested by the trustees (but with power to resort to accumulations) for the benefit of the person who ultimately becomes entitled to the property from which the same arises,' (*ibid.* (2)). After much conflict of opinion, it has now been decided, that the accumulations become part of the corpus of the property, and are subject to the trusts affecting the corpus — i. e. if the minor is only a tenant for life, he only gets the interest on them (*Re Bowlby* [1904] 2 Ch. 685). Presumably, the direction to accumulate only applies where the infant will be entitled, on fulfilling the contingency, to the intervening income.]

Survival of powers

1810. Where, under a settlement coming into operation after 1881, a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being;[a] and, until the appointment of new trustees under such a settlement, the personal representatives or representative for the time being of a sole trustee, or of a last surviving or continuing trustee, may (subject to the terms of the settlement) exercise any power given to, or capable of being exercised by, the sole or last surviving or continuing trustee.[b]

(a) Trustee Act, 1893, s. 22.

[It will be observed that the section makes no provision for merely 'continuing' trustees, e. g. where one trustee has retired under the provisions of s. 11 of the Trustee Act, 1893.]

(b) Conveyancing Act, 1911, s. 8.

[Apparently, the rule about survivorship only applies where the powers are conferred on the trustees as such (*Crawford* v. *Forshaw* [1891] 2 Ch. 261 — where, however, the corresponding section (38) of the Conveyancing Act, 1881, was not referred to). But the tendency of the Courts is against construing powers as personal (*Re Smith* [1904] 1 Ch. 139). Presumably, the rule in s. 22 of the Trustee Act applies to statutory as well as to express powers. As to the effect of disclaimer of powers, see *ante*, Sect. VI, Tit. I, § 1468 (i). But, presumably, a person appointed trustee could hardly disclaim a power given him as such, without disclaiming the trust.]

Powers of new trustees

1811. Every trustee appointed under Title II, §§ 1776 (ii) (iii) (iv), and 1777, *ante*, has, as well

before as after the trust property becomes vested in him (*post*) Tit. VII, §§ 1829, 1831) the same powers, authorities, and discretions, and may in all respects act, as if he had originally been appointed a trustee by the instrument, if any, creating the trust.

Trustee Act, 1893, ss. 10 (3), 37.

[Presumably s. 37 of the Trustee Act, 1893, would apply to a judicial trustee; in spite of the fact that it was passed before judicial trustees were created. There is no general provision as to the powers of judicial trustees in the Judicial Trustees Act, 1896. But the Court may give a judicial trustee any general or special directions in regard to the trust or the administration thereof (*ibid.*, s. 1 (4)).]

Indemnity out of trust property

1812. Trustees are entitled to be indemnified out of the trust property for all expenses and liabilities properly incurred by them in or about the execution of the trust; and such indemnity will be a first charge on the trust property.

Trustee Act, 1893, s. 24.
Re Turner [1907] 2 Ch. 126.

[The most striking illustration of this rule is to be found in the fact that costs have been allowed out of the property to trustees of a settlement which was set aside as fraudulent under the 13 Eliz. c. 5; they being personally innocent (*Ideal Bedding Co.* v. *Holland* [1907] 2 Ch. 157).]

Personal claim on beneficiaries

1813. As against beneficiaries of full age and capacity, the trustees [a] have also a personal claim to indemnity in respect of such expenses and liabilities; [b] and such claim will not be extinguished by the fact that the beneficiaries have parted with their interests, if the expenses and liabilities were incurred whilst the beneficiaries held their interests.[c] But such claim may be excluded, either by express provision of the settlement, or by implication from the circumstances.[d]

(a) The right of a trustee passes to his trustee in bankruptcy (*St. Thomas' Hospital* v. *Richardson* [1910] 1 K. B. 271).
(b) *Hardoon* v. *Belilios* [1901] A. C. 118.
(c) *Matthews* v. *Ruggles-Brise* [1911] 1 Ch. 194.
(d) *Wise* v. *Perpetual Trustee Co.* [1903] A. C. 139.

[It does not seem quite clear whether the liability of the beneficiaries is put on the ground of implied request or on the ground that the trustees were compelled to incur the expenses. The former appears to be the most satisfactory basis.]

Indemnity against co-trustee

1814. A trustee who has reasonably allowed the management of the trust property to remain in the hands of a co-trustee, on account of the latter's special knowledge and skill, or other circumstances, may be given, in the discretion of the Court, an indemnity from such co-trustee in respect of any liability for breach of trust incurred through the default of such co-trustee.

Bakin v. *Hughes* (1886) 31 Ch. D. 390.
Re Linsley [1904] 2 Ch. 785.

[Of course the innocent trustee is liable to the beneficiaries (see *post*, Tit. VI, § 1822. That is, indeed, the basis of his claim to indemnity.]

Contribution from co-trustees

1815. A trustee who has been called upon to make good a breach of trust not occasioned solely by his own fault, and not amounting to actual fraud, will be entitled to contribution from his co-trustees.

Robinson v. *Harkin* [1896] 2 Ch. 415.
Jackson v. *Dickinson* [1903] 1 Ch. 947.

Impounding of beneficiary's interest

1816. Where a beneficiary has instigated, or consented in writing to, a breach of trust, his beneficial interest may, in the discretion of the Court, be impounded to recoup the trustee for any liability

incurred by him through such breach; even where the beneficiary is a married woman restrained from anticipation (see *ante*, Bk. I, Sect. III, Tit. II, §§ 105–108).

Trustee Act, 1893, s. 45.
Griffiths v. *Hughes* [1892] 3 Ch. 105.
Re Somerset [1894] 1 Ch. 231.

TITLE VI — REMEDIES FOR BREACH OF TRUST

Against the trust property

1817. A beneficiary may claim the trust property, in whose hands soever it may be; except that he cannot claim it against a *bonâ fide* purchaser for value, who has acquired the legal ownership (or the best right to call for it) without notice of the trust, or against persons (other than the trustee himself) taken through such purchaser.

Hunter v. *Walters* (1871) 41 L. J. Ch. 175 ('best right to call').
Pilcher v. *Rawlins* (1872) L. R. 7 Ch. App. 260.
Taylor v. *Russell* [1892] A. C. 244.
Wilkes v. *Spooner* [1911] 2 K. B. 473.

[The exception from the general rule stated in the § is merely the result of the application of the maxim: 'where the equities are equal, the law must prevail.' Its scope has been carefully explained in earlier parts of the work (see Sect. I, Tit. XI, §§ 1313–1321, and Sect. IX, Tit. II, § 1548). The general rule in the § is the best illustration of the important principle, that the interest of the beneficiary under a trust is not merely a chose in action, but actual property, protected against all except a limited class of persons.]

Against the proceeds

1818. Subject to the exception specified in § 1817, a beneficiary may also claim the proceeds of trust property, improperly converted by the trustee in breach of trust, so long as he can identify them. And if the proceeds remain in the hands or under the control of the trustee, the beneficiary will be

preferred to the general creditors of the trustee, even in the latter's bankruptcy.

Taylor v. *Plumer* (1815) 3 M. & S. 562.
Hopper v. *Conyers* (1866) L. R. 2 Eq. 549.
Re Hallett (1879) 13 Ch. D. 696.
Re Oatway [1903] 2 Ch. 356.

[This rule, which is one of the most striking features of the law of trusts, and, in some ways, makes a beneficiary's interest stronger than some legal claims, is not confined strictly to trusts, but is applied to all cases of fiduciary ownership, e. g. broker and client's money (*Hancock* v. *Smith* (1889) 41 Ch. D. 456), solicitor and clients' funds (*Re Stenning* [1895] 2 Ch. 433). Very slight marks of identification have been treated as sufficient; and probably *Coleman* v. *Bucks, &c. Bank* [1897] 2 Ch. 243, was wrongly decided. To a certain extent, as the cases show, the rule even supersedes the doctrine that money has no ear-mark, or, as it is more correctly put, that current coin of the realm cannot be recovered after it has passed in currency (*Miller* v. *Race* (1758) 1 Burr., at p. 459, *per* Lord Mansfield, C. J.). The method of enforcing the rule is, to declare the legal owner of the proceeds a trustee for the beneficiary, with (if necessary) a consequential vesting order under § 1831, *post*.]

Tracing proceeds

1819. In tracing the identity of the proceeds of an improper conversion of trust property, a trustee who has paid such proceeds into a blended fund, containing also moneys of his own, will be deemed, in every case, regardless of the dates of the payment in of the trust funds and his own, to have drawn against his own money, so long as any remains in the fund.[(a)] But as between rival beneficiaries under different trusts, the proceeds of whose trust property have been paid into a blended fund, the trustee will be deemed (in the absence of proof to the contrary) to have

drawn against such trust proceeds in the order in which they were paid in.[b]

(a) *Re Hallett, ubi sup.*
Hancock v. *Smith, ubi sup.*
Re Oatway, ubi sup.

[If the remaining fund exceeds the amount of the beneficiary's claim, he gets a charge upon it; if not, he takes the whole (*Re Hallett, ubi sup.*, at p. 709).]

(b) *Clayton's Case* (1816) 1 Mer. 585.
Re Stenning [1895] 2 Ch. 433.

[The Rule in *Clayton's Case*, which applies generally to rival claimants on a mixed fund, is merely a presumption of fact, not a rule of law (*Deeley* v. *Lloyds' Bank* [1912] A. C., at p. 771, *per* Lord Atkinson); and a fraudulent trustee can, if he pleases, favour one or more trust funds at the expense of others, if his intention is clear.]

Against the trustee's beneficial interest

1820. A beneficiary can claim to have any beneficial interest which the trustee may himself have (whether original or acquired) in the same trust fund, impounded to satisfy a breach of trust by the trustee; and such claim will prevail even against a *bonâ fide* purchaser of the trustee's beneficial interest (not being a purchaser for value of a legal interest without notice of the trust) who paid his money before the breach of trust was committed.

Priddy v. *Rose* (1817) 3 Mer. 86.
Barnett v. *Sheffield* (1852) 1 De G. M. & G. 371.
Cole v. *Muddle* (1852) 10 Hare, 186.
Doering v. *Doering* (1889) 42 Ch. D. 203.

[The principle is: that the trustee is deemed to have paid himself (*Doering* v. *Doering*, *ubi sup.*). But the rule only applies where the trustee's beneficial interest is really part of the trust fund, not where it merely arises under the same instrument which contained the settlement (*Fox* v. *Buckley* (1876) 3 Ch. D. 508; *Re Towndrow* [1911] 1 Ch. 662).]

Against the trustee personally

1821. Subject to §§ 1823 and 1826, *post*, the Court will order a trustee (including a constructive trustee[a]) to pay personally to the trust fund any loss occasioned by any breach of trust committed by him; and such order may be enforced as a judgment debt by execution against the trustee's own property,[b] and, if the loss is the loss of money which has been in the trustee's possession or under his control, at the discretion of the Court, by an order for attachment of the trustee's body.[c]

(a) *Smith* v. *Patrick* [1901] A. C. 282.
(b) R. S. C., O. XLII, s. 54.

[As to the enforcement of judgments by execution, see *ante*, Sect. V, § 1457 n., and Sect. XI, § 1607. If a trustee is ordered to deliver up papers, and does not comply, a writ of assistance may be issued against him (*Re Taylor* [1913] W. N. 212).]

(c) Debtors Act, 1869, s. 4 (3).
Debtors Act, 1878, s. 1.
Middleton v. *Chichester* (1871) L. R. 6 Eq. 152.

[Before a writ of attachment can be obtained, however, certain formalities must be carefully observed (*Re Oddy* [1906] 1 Ch. 93), including the rather difficult task of serving upon the trustee, with the notice of motion, a copy of affidavit of service thereof (O. LII, r. 4). And the money lost must actually have been under the trustee's control. A mere constructive receipt through an agent, for whom the trustee is responsible, is not enough (*Re Fewster* [1901] 1 Ch. 447). And the Court will not accept even a formal admission of the trustee as conclusive against him (*Harper* v. *McIntyre* (1908) 99 L. T. 191).]

Liability of co-trustees

1822. The personal liability of co-trustees is joint and several; and acceptance of a composition from one or more of such trustees does not prevent the

beneficiary proceeding against the other or others for the full amount of the loss, until the whole has been made good.

Edwards v. *Hood-Barrs* [1905] 1 Ch. 20.

[The right of trustees to contribution from their co-trustees has been already explained (see *ante*, Tit. V, § 1815).]

Statutes of limitation

1823. An express trustee, in answer to a claim for breach of trust, may not plead the statutes of limitation in any case where the claim is founded on any fraud or fraudulent breach of trust to which he was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by him and converted to his own use. In other cases, a trustee may plead the statutes of limitation applicable. Where no statute of limitation in force on 24th December, 1888, applies, the claim will be treated (even as against a married woman restrained from anticipation) as a claim of debt for money had and received; but time will only begin to run against a beneficiary from the date when his interest became an interest in possession.

Trustee Act, 1888, s. 8 (1).

[Originally, the Court of Chancery never allowed an express trustee to set up the statutes of limitation; and it even claimed to disregard them in suits to recover equitable property from strangers. This last claim was, however, rendered untenable as to land by the Real Property Limitation Act, 1833, s. 24; and there is no statute of limitations (other than that embodied in the §) applicable to the recovery of pure personalty. But the rule as against the express

trustee himself was expressly preserved by the Judicature Act, 1873, s. 25 (2), and remained in force till the passing of the Trustee Act of 1888, which provides (s. 8 (2)) that the claim of one beneficiary shall not be kept alive by a judgment or order obtained by another. For the purposes of the rule, an 'express' trustee includes all persons with whom property has been deposited on the strength of a fiduciary relation (*Soar* v. *Ashwell* [1893] 2 Q. B., at p. 397, *per* Bowen, L. J.).]

Effect of trustee's bankruptcy

1824. A personal claim against a trustee founded on fraudulent breach of trust, is not extinguished by the discharge of the trustee in bankruptcy proceedings;[a] but it is extinguished by a voluntary acceptance, duly made by the beneficiary or on his behalf, of a composition.[b]

(a) Bankruptcy Act, 1883, s. 30 (1).
(b) *Re Sewell* [1909] 1 Ch. 806.

Relief against breach of trust

1825. A trustee who is or may be personally liable for a breach of trust may be relieved, wholly or partially, from such personal liability by the Court, if it appears to the Court that he has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the direction of the Court in the matter in which he committed such breach.

Judicial Trustees Act, 1896, s. 3.
Perrins v. *Bellamy* [1899] 1 Ch. 797.
Re Mackay [1911] 1 Ch. 300.
Re Allsop [1914] 1 Ch. 1.

[The Court has felt a difficulty in interpreting this enactment, inasmuch as a trustee who has acted 'reasonably and honestly' is

not, *primâ facie*, personally liable at all (*Re Mackay*, *ubi sup.*). But the view taken is, that the section was intended to cover cases in which, though guilty of a technical breach of trust in view of the high standard of diligence demanded of a trustee, the trustee has acted as an ordinarily prudent business man would act, e. g. in following the advice of experts believed to be capable. In fact a trustee has been excused under it who had actually paid trust funds to the wrong person (*Re Allsop*, *ubi sup.*).]

Beneficiary must discharge liabilities to trust

1826. A beneficiary cannot enforce any claim against a trust fund until all obligations due from him under the settlement have been discharged.

Priddy v. *Rose* (1817) 3 Mer., at p. 104, *per* Grant, M. R.
Re Weston [1900] 2 Ch. 165.

Concurrent remedies of beneficiary

1827. A beneficiary may pursue all his remedies at once, or in any order he pleases, and continue to do so until he has recovered all that he has lost by the breach of trust.

Frances v. *Frances* (1854) 3 De G. M. & G. 108.

[The amount of judicial and literary authority for this important proposition is astonishingly small; but its truth can hardly be doubted. Nevertheless, it may give rise to difficult questions, and even some hardship, in practice, e. g. where a purchaser from a trustee is technically affected with notice of the trust, though without personal default, and the beneficiary refuses to proceed against the trustee personally.]

TITLE VII—TRANSFER OF THE TRUST ESTATE

Conveyance of trustee's interest

1828. The interest of the trustee will pass by any conveyance or event by which a similar interest belonging to the trustee beneficially, would pass; but it will (subject to Tit. VI, § 1817, *ante*) remain subject to the claims of the beneficiaries.

[This is elementary law; for which it is hard to find any direct authority. Trustees are invariably made joint owners; and therefore, on the death of one of them, his interest passes to the survivor or survivors (*ante*, Sect. XVI, Tit. II, § 1753). In case of the death of a sole trustee, since the coming into operation of the Conveyancing Act, 1881 (s. 30), his interest (even though it consists of freehold real estate of inheritance) passes on his death to his personal representatives; and this is now in accordance with the general law (Land Transfer Act, 1897, s. 1). But if the interest is a legal copyhold estate, it still passes to his customary heir or devisee (Copyhold Act, 1894, s. 88).]

Vesting declaration

1829. Where a new trustee has been appointed under Tit. II, § 1776, 1777, *ante*, or where a retiring trustee is discharged under § 1778, of that Title, if the deed of appointment or discharge contains a vesting declaration, the trust property passes accordingly to the persons who by such deed become and are the trustees for performing the trust, or the continuing trustees, as the case may be, as joint owners, for the purposes of the trust, without any conveyance or

assignment; except that this § does not apply to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, or annuity, or property, as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament.

Trustee Act, 1893, s. 12 (1) (2) (3).

[In the case of a retiring trustee, the deed must be executed by the retiring and continuing trustee, and by such other person (if any) as is empowered to appoint trustees (*ibid.* (2)).]

No liability for trustee's debts

1830. There can be no involuntary alienation of the interest of a trustee;[a] except by his death,[b] or by his removal by the Court under § 25 of the Trustee Act, 1893 (*ante*, Tit. II, § 1776 (iv)), followed, if necessary, by a vesting order (*post*, § 1831).

(a) Bankruptcy Act, 1883, s. 44 (1) (bankruptcy).
Trustee Act, 1893, s. 48 (conviction for felony).
Law of Distress Amendment Act, 1908, ss. 1, 2 (distress — with exceptions).
Finch v. *E. of Winchelsea* (1715) 1 P. Wms., at p. 282, *per* Lord Cowper, C.
Foley v. *Burnell* (1783) 1 Bro. C. C., at p. 278, *per* Lord Thurlow, C.
Duncan v. *Cashin* (1875) L. R. 10 C. P. 554.
Wright v. *Redgrave* (1879) 11 Ch. D., at p. 33, *per* Bramwell, L. J.
} (execution for debt).

[For some time after the passing of the Judicature Act, 1873, there was some doubt as to how the interest of the beneficiaries should be protected on a seizure by the trustee's creditor; the old practice of applying to Chancery for an injunction against the sheriff having been forbidden by s. 24 (5) of the Judicature Act. But

it is now settled, that the beneficiaries may either call upon the sheriff to interplead (*Duncan* v. *Cashin*, *ubi sup.*), or may apply in the Division which issued the judgment (*Wright* v. *Redgrave*, *ubi sup.*).]

(b) As to this, see *ante* § 1828, n.

[Though the authorities are somewhat scanty, it is unquestionable that the beneficiary's interest could not now be made to suffer by claims to dower, curtesy, and escheat, against the trustee's estate. On the other hand, these incidents now attach to the interest of the beneficiary (*ante*, Tit. I, Sect. XI, §§ 1306, 1307).]

Vesting orders

1831. Where for any reason there is a difficulty with regard to the transfer of, or dealing with, trust property, being land, stock (including shares in British ships) or choses in action, owing to a defect of or uncertainty in title, or owing to the incapacity of a person in whom the title is vested to deal with the property, or to the absence from the country of a trustee, or to the wilful refusal of a trustee to convey when he ought to do so, the Court may, on the application of any person beneficially interested, make a vesting order, vesting such property, or, (in the case of stock) the right to transfer and receive dividends, in any such manner, and for any such estate or interest, as the Court may direct, or may make an order vesting the right to transfer such property in any person whom the Court may direct.

Trustee Act, 1893, ss. 26, 27, 32, 33, 35, 36.

[The provisions of the above sections are very long, and cannot be set out in detail. But it is believed that the § accurately represents the result of them. When the property in question is copyhold, the rights of the lord of the manor are saved (*ibid.*, s. 34).

Where land is subject to the contingent rights of unborn persons, who, if born, would be entitled as trustees, the Court may make an order releasing the rights or vesting the contingent estate of the unborn persons (*ibid.*, s. 27). It seems curious that there should, apparently, be no statutory provision of this kind on the subject of chattels corporeal.]

TITLE VIII — TRANSFER OF THE BENEFICIAL INTEREST

Involuntary alienation of beneficial interest

1832. A beneficial interest in property held on trust is (subject to Bk. I, Sect. III, Title II, §§ 105–108, *ante*) liable to involuntary alienation on the death, bankruptcy, or suffering of judgment of the beneficial owner, to the same extent as any other property belonging to him beneficially (see *ante*, Sect. V, §§ 1453, 1457; Sect. XI, §§ 1604, 1605, 1607; Sect. XIV, Tit. II, §§ 1705–1711, *ante*).

Judgments Act, 1838, ss. 11, 13, 14.
Bankruptcy Act, 1883, s. 44.

[Generally speaking, beneficial interests in trust property can only be taken in execution by the appointment of a receiver (Judgments Act, 1838, s. 13). But it would seem that chattels corporeal held in trust for the debtor solely can be seized under a Fi. Fa., at any rate with the leave of the Court (*Horsley* v. *Cox* (1869) L. R. 4 Ch. App., at p. 100, *per* Lord Hatherley, C.; *Bennett* v. *Powell* (1855) 3 Drew. App. 326, *per* Kindersley, V. C.; *Stevens* v. *Hince* (1914) XXX T. L. R. 419).]

Voluntary alienation

1833. Subject to Bk. I, Sect. III, Tit. II, §§ 105–108, *ante*, a beneficiary may freely transfer his interest. But every voluntary transfer of a beneficial interest in trust property will be void unless it is by testament,[a] or by writing signed by the party granting or assigning the same.[b]

(a) Wills Act, 1837, s. 3.
(b) Statute of Frauds (1677) s. 9. This is one great difference between a trust interest and an ordinary chose in action (see *ante*, Sect. XIV, Tit. I, § 1702).

Rule in Dearle *v.* Hall

1834. Transfers of beneficial interests in pure personalty take effect in the order in which notices of such transfers are received by the trustee [a] after he has acquired control of the trust property.[b] Notice to one of co-trustees is notice to all;[c] but if notice is given only to one or more of co-trustees, not to all of them, and the trustee or trustees who have received notice die without having, in fact, communicated such notice to their co-trustees, a subsequent *bonâ fide* transferee who, without notice of the previous transfer, gives notice to the then existing trustee or trustees, will take priority over the earlier transferee.[d]

(a) *Dearle* v. *Hall* (1828) 3 Russ. 1.

[The rule in *Dearle* v. *Hall* has no application to interests in land (*Ward* v. *Duncombe* [1893] A. C., at p. 390, *per* Lord Macnaghten). But it applies to interests in trust moneys invested on mortgage of land, and to the proceeds of land settled on trust for sale (*Lloyds' Bank* v. *Pemson* [1901] 1 Ch. 865).]

(b) *Re Dallas* [1904] 2 Ch. 385.
(c) *Ward* v. *Duncombe* [1893] A. C. 369.

[Consequently, so long as the trustee who received the notice continues to be a trustee, the person giving notice cannot be ousted (*Ward* v. *Duncombe*, *ubi sup.*). Trustees, however, are not deemed to have notice of an assignment of his beneficial interest by one of their number who is also a beneficiary; unless in fact notice reaches them (*Brown* v. *Savage* (1859) 4 Drew. 635).]

(d) *Re Phillips' Trusts* [1903] 1 Ch. 183.

[On the other hand, a transferee who gives notice to all the trustees for the time being is safe; even if they all die and are replaced by new trustees who, in fact, do not know of the transfer (*Re Wasdale* [1899] 1 Ch. 163). Where there are successive assignments of the beneficial interest, and some of the assignees do, and some do not, give notice to all the trustees, difficult questions of priority may arise, which are probably settled by the application of the doctrine of subrogation (cf. *Re Lord Kensington* (1885) 29 Ch. D. 527). Trustees are not bound to give information to strangers about the state of the trust fund; but, if they do, they are bound by their statements, and must make good any loss incurred by the enquirer on the faith of them (*Low* v. *Bouverie* [1891] 3 Ch. 82).]

INDEX TO BOOK III

SECTIONS XIII TO XVII

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